

(28,742)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 787.

THE CHARLES NELSON COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

No. 34047.

THE CHARLES NELSON CO.

VS.

THE UNITED STATES.

I. *History of Proceedings.*

On January 23, 1919, the plaintiff filed its original petition herein.

On March 15, 1919, the defendant filed a demurrer to the petition.

On March 24, 1919, the demurrer was argued and submitted.

On April 21, 1919, the demurrer was ordered to the law calendar for argument before a full bench.

On December 15, 1919, the demurrer was argued and thereupon ordered that case be remanded, with leave to plaintiff to file an amended petition within thirty days.

On January 16, 1920, the plaintiff filed an amended petition.

On March 13, 1920, the defendant filed a demurrer to the amended petition.

2 On April 26, 1920, the demurrer was argued and submitted and thereupon ordered that the demurrer be overruled without prejudice.

II. *Amended Petition.*

Filed January 16, 1920.

To the Honorable Court of Claims:

The claimant, The Charles Nelson Co., a corporation, respectfully represents and states:

1. That your petitioner is and has been at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California.

2. That after due advertisement and the opening on January 3, 1917, of formal competitive bids, claimant was, on February 23, 1917, awarded a certain written contract for furnishing lumber to the United States alongside its wharf, Navy Yard, Puget Sound, State of Washington, for the naval service at said place.

3. That by the terms of said contract claimant agreed to sell 1,675,000 feet of Douglas Fir lumber to the United States, to be delivered at said wharf and in such quantities and at such times during the period ending December 31, 1917, as the supply officer might direct, at and for prices to be based on Export G list, latest edition, Pacific Inspection Bureau: a copy of

3

which contract and the bond therein required and executed to procure the performance thereof, marked "Exhibit A" heretofore annexed to the original petition herein is hereby made a part hereof.

4. That thereafter the aforesaid supply officer, under and in pursuance of the terms of said contract, directed claimant from time to time to deliver certain quantities and qualities of said Douglas Fir lumber to the United States at said wharf for the naval service at said place, said amounts so ordered amounting in the aggregate to the full amount of said lumber so provided for in said contract, to-wit: 1,675,000 feet, which said several orders were received and accepted by claimant; that thereafter claimant delivered to the United States the lumber so ordered in said aggregate amount of 1,675,000 —, all of which was accepted by the United States and has been fully paid for at said contract price.

5. That at the time of the making of said contract the naval service for which lumber was used by the United States at said navy yard was, and theretofore had been, chiefly the making of certain repairs on vessels and the maintenance of said yard, requiring in any period of one year an amount of lumber approximately the amount so contracted for and so delivered, accepted and paid for; that after the entrance of the United States into the present war, the United States undertook, maintained and performed at said navy yard certain new, different and additional work, including the construction of submarine chasers, the same being a new type of naval vessel requiring therefor Douglas Fir lumber in quantities and qualities greatly in excess of the previous requirements of the United States for naval service at said navy yard and that before
4 the execution of said contract no vessel of this type had been constructed by, for, or in the United States.

6. That, at the time of the making of said contract, the United States, in order to require claimant to deliver only such portion or portions of said lumber so contracted for as the aforesaid supply officer might direct, and also in order to relieve the United States from liability for failure to order the full amount of said lumber so contracted for, or to order several amounts aggregating such total amount, caused the following provisions to be incorporated in said contract, to-wit:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas Fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas Fir contracted for."

7. That after the aforesaid supply officer had so ordered of claimant said aggregate amount of said lumber so contracted for, to-wit, 1,675,000 feet, and claimant had accepted such order, and the aforesaid new and additional work had been so undertaken by the United

States at said navy yard, the current market value of and the demand for Douglas Fir lumber of the kinds and qualities provided for in said contract greatly increased and the requirements of said navy yard for the maintenance and operation of said new and additional work so undertaken thereat by the United States and for the construction of said new type of naval vessel at said yard, became at once and continued to be very great and urgent.

8. That, thereupon and thereafter the aforesaid supply officer, acting as such for the United States, began and continued to submit to claimant a series of demands for delivery to the United States at said navy yard of certain qualities and quantities of Douglas Fir lumber, independent of and in addition to, said orders theretofore made and accepted up to the aggregate amount of said lumber so contracted for.

9. That claimant thereupon notified the aforesaid supply officer that orders had theretofore been made by the United States under said contract, and accepted by claimant, up to the full amount of lumber so contracted for, and denied that claimant was liable under said contract to be required by the United States to accept and fill such new and additional orders, or any of them, and protested against said new and additional orders and against being required to accept and fill the same. That a written communication was sent to said supply officer in the following language, to-wit:

Refer — Contract No. 28942.

Class No. 5.

Schedule No. 473.

C. & R.

"May 21, 1917.

Supply Officer,
Navy Yard, Puget Sound.

DEAR SIR:

By referring to this contract, which calls for 1,675 M feet of lumber in sizes or grades as may be required, in amount up to but not to exceed 1,675 M feet as needed during a period ending December 31, 1917. Up to the present time, including the one scowload which we will deliver today, we have delivered against this contract approximately 950 M. We have orders which you have sent us for delivery, of approximately 1,186 M. There is due on this contract only 725 M, so that you will have to recall approximately 461 M of these orders which you have sent us, as we cannot apply them against this contract, for we cannot exceed the amount of the original contract, viz.: 1,675 M feet.

Would kindly ask you to advise us what portion of these orders which we now have unfilled on our books, that you wish to withdraw.

Yours respectfully,

CROWN LUMBER COMPANY,
By A. A. SCOTT, *Manager.*"

And said claimant further protested against being required to furnish said lumber under the terms of said contract in the following letter addressed to said supply officer, to-wit:

"June 11, 1917.

Mr. H. P. Tichenor,
Supply Officer Dept.,
Navy Yard, Puget Sound.

DEAR SIR:

In reference to your order of June 5th, No. 7 account of contract No. 28942, Schedule No. 473, amounting to approximately 85 M feet of Douglas Fir Clear Rough, we are accepting this order under protest.

Yours respectfully,

CROWN LUMBER COMPANY,
By A. A. SCOTT,
Manager."

10. That the United States, acting through its said navy yard and its supply officer aforesaid, and relying upon a portion of the provisions of said contract last above set forth, asserted and claimed that claimant was required by the terms of said contract to accept and fill any and all new and additional orders for said Douglas Fir lumber that the United States might desire to order for its use at said navy yard until December 31, 1917.

7 11. That the United States notified claimant through its said navy yard and supply officer, that its need for said lumber was immediate and urgent and that it was the intention of the United States, in case of refusal or failure by the claimant to accept and fill said orders, to purchase said lumber on the open market and charge the purchase price thereof to claimant's account, and sent to claimant a letter in the following language, to-wit:

"June 14, 1917.

"The Charles Nelson Company,
230 California Street,
San Francisco, Cal.

GENTLEMEN:

With reference to the matter of delayed and delinquent deliveries under Contract 28942, the following telegram received on June 4th from the Bureau of Supplies and Accounts, Navy Dept., Washington, D. C., is quoted for your information:

'Contract 28942 if contractor fails make delivery purchase authorized as requested.'

The above wire is in reply to a telegram from this office requesting that authority be granted for immediate purchase against your account in the open market of all lumber for the submarine chasers on which deliveries may be unsatisfactory.

A copy of this letter is being furnished Mr. A. A. Scott, of the Crown Lumber Company.

Respectfully,

H. P. TICHENOR,

By Direction of Supply Officer."

That the market value of said lumber had greatly increased and the supply thereof in the market had so far decreased that it was not possible for the United States to secure in the open market said lumber for delivery within the terms of said contract.

12. That thereafter claimant, still so denying the right of the United States to require claimant to accept and fill said new and additional orders for said lumber, and still protesting against being required so to do under the terms of said contract, by reason of and because of the immediate and urgent need of the United States for said lumber, and by reason of the declared intention of the United States to purchase said lumber on the open market and charge the purchase price thereof to claimant's account, and by reason of the fact that such action on the part of the United States would imperil and alarm the sureties on said bond and would impair and irreparably injure the financial credit and good name of claimant, and by reason of the fact that claimant was compelled to submit to such demands and to yield to such threats of the United States or assume the risk of being heavily penalized and suffer great financial damage and loss under the terms of such contract if the same were held to be valid, furnished and delivered to the United States all amounts of Douglas Fir lumber ordered of claimant by the United States for use at said navy yard of the qualities and quantities contained in all said new and additional orders made by said supply officer upon claimant, in the aggregate amount of 2,314,930 feet over and above said 1,675,000 feet provided for in said contract, all of which was accepted and retained by the United States and used in the construction of submarine chasers.

13. That a bill of particulars of said lumber so sold and delivered to the United States on said new and additional orders, marked "Exhibit B," was annexed to the original petition herein and is hereby made a part hereof.

9 That the several qualities and quantities of said lumber set forth in said bill of particulars were so ordered by the United States on the several dates noted on said bill of particulars and were so delivered on the several dates so noted.

14. That the United States asserted the right to require claimant to accept the several prices provided for in said contract for the lumber so furnished on said new and additional orders in excess of the amount provided for in said contract. The claimant refused to accept said several prices for said lumber, and demanded payment of the several market values of said items of said bill of particulars at the times of the order thereof. After claimant protested against furnishing any lumber in excess of the amount named in the contract,

to-wit, 1,675,000 feet, and after claimant had demanded payment of the market value of said additional amount of lumber so furnished and after the United States had accepted and received said lumber, said United States paid to the claimant a sum of money equal to the aggregate price of like items of lumber if furnished under said contract, which said sum claimant accepted as partial payment and has credited to the United States as partial payment of the amount due for said lumber. That the United States refused to pay claimant the difference between any of the said several contract prices and said several market values of said items of lumber, which several differences are separately noted on said bill of particulars. That the total amount of such differences between said market values and said contract prices is the sum of \$20,321.33, all of which specifically appears by said bill of particulars, which sum of \$20,321.33 is past due and unpaid.

15. That no action upon your claimant's foregoing claim has been had before Congress. That said claim was presented to the
10 Navy Department and payment thereof refused by said Department. That claimant appealed from this decision of the Navy Department to the Treasury Department. That said Treasury Department refused to authorize the payment of said claim. That no transfer or assignment of said claim, or any part thereof, or interest therein, has been made. That said claim is now owned by your claimant, and no other person or corporation is the owner thereof or is interested therein, and that your claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets; that your claimant has at all times borne true allegiance to the United States, and has not in any way voluntarily abetted or given encouragement to rebellion against said Government.

Prayers.

Wherefore, your claimant prays:

1. That the court will render a judgment against the United States in favor of your claimant for the payment by the United States to your petitioner of the said sum of Twenty Thousand Three Hundred and Twenty-one Dollars and Thirty-three Cents (\$20,321.33)
2. That your claimant may have such other and further relief as justice and the exigencies of its case may require.

THE CHARLES NELSON CO.,
By W. E. HUMPHREY,
Attorney for Claimant.

WILLIAM C. PRENTISS,
Of Counsel

11 CITY OF WASHINGTON,
District of Columbia, ss:

W. E. Humphrey, being first duly sworn, says that he is the attorney of The Charles Nelson Co.; that he has authority to subscribe to and verify the foregoing amended petition from said company; that he has read said amended petition, knows the contents thereof and the facts therein stated, and that he believes the same to be true.

W. E. HUMPHREY.

Subscribed and sworn to before me this 16th day of January, A. D. 1920.

ETHEL R. GUISE,
Notary Public in and for the District of
Columbia, Residing in Washington.

My commission expires December 4, 1922.

12 "Claimant's Exhibit A."

N. S. A. 535.

Contract No. 28942. Opening January 3, 1917.

(All correspondence relative to inspection, deliveries, damages, payments, etc., hereon, must refer to the above contract number and the number of the class concerned.)

This contract of two parts, made and concluded this 23d day of Feb., 1917, A. D. 19—, by and between The Charles Nelson Co., 230 California St., of San Francisco, in the State of California, party of the first part, and the United States, by the Paymaster General, United States Navy (Chief of the Bureau of Supplies and Accounts), acting under the direction of the Secretary of the Navy, party of the second part, Witnesseth, That for and in consideration of the payments hereinafter specified, the party of the first part, for itself and its personal and legal representatives, doth hereby covenant and agree to and with the party of the second part, as follows, viz:

1. That it, the said party of the first part, will furnish and deliver, at its own risk and expense, the following classes of articles, at the place and within the time stated for each class, and at the price set opposite each item as appended hereto, respectively:

Class 5.—(Request No. 143, G. A. A., Naval Supply Account, C and R.—Puget Sound, Wash.—Sch. 473.)

To be delivered f. o. b. scow, alongside wharf, navy yard, Puget Sound, Wash., in such quantities and at such times during the period ending December 31, 1917, as the supply officer may direct.

All deliveries to be made promptly and orders of 50,000 feet b. m. or less of assorted sizes, not more than 10,000 feet b. m. of any one size, except with the consent of the contractor, must be delivered within 10 days after receipt of order.

All other orders must be delivered within 25 days after date of receipt of order from the supply officer.

If unable to make delivery within the time specified, state the actual time required. Alternate bids with a greater time for
13 delivery may be submitted and will be considered, but the right is reserved to make award on time stated above.

It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending Dec. 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for.

Class 5.—Continued.

Stock Classification No. 39.

Fir, Douglas, as follows:

1. 1,675,000 feet b. m. (about), of such sizes or grades as may be ordered — per M feet.

Price and extras to be based on Export G List, latest edition, Pacific Lumber Inspection Bureau, and bidders to enter below the reductions they will make from list prices.

Reduction for rough merchantable, per M feet.....	8.00
Reduction for edge grain, clear, per M feet.....	11.50
Reduction for clear, per M feet.....	9.50
Reduction for selects, per M feet.....	9.50
Reduction for common, per M feet off Mercht.....	9.50

Reduction of extra charges for—

Specified lengths, per M feet.....	Omit.
Fractional increase in thickness, per M feet.....	Omit.
Fractional increase in width, per M feet.....	Omit.
Surfacing one side, per M feet.....	25%
Surfacing each additional side, per M feet.....	25%
Reduction for railroad ties, per M feet.....	7.50
Reduction for ship plank, per M feet.....	7.50
Reduction for decking, per M feet.....	9.50
Reduction for flooring, per M feet.....	11.50
Reduction for rustic siding, per M feet.....	15.50
Reduction for ceiling, per M feet.....	16.50
Additional reductions which will be allowed on all items if accepted f. o. b. wharf or car at contractor's mill, per M feet.....	1.00

Estimated 45,000.00

14 Grading and measurement to be in accordance with Export G List, Pacific Lumber Inspection Bureau, and to be done by regular inspectors of the Pacific Lumber Inspection Bureau, at

the expense of the contractor. All rules in Export G List, Pacific Lumber Inspection Bureau, to apply, except paragraphs numbered 6, 7, 8 and 9 on pages 4 and 5 of above list.

The prices stated above are for scow-load lots of not less than 50,000 feet b. m.

The bid prices should be based on delivery f. o. b. scow. Should the contractor elect to make delivery f. o. b. car on gridiron, payment will be made at a price of \$0.25 per M feet b. m. in advance of the bid price.

Government to be allowed forty-eight hours free time in which to unload 50,000 feet b. m. from scow, with twenty-four hours additional free time for every additional 50,000 feet; time in excess of this to be paid for at the rate of \$15.00 per day or fraction thereof. Delivery scow to be given free berth at navy yard, and to be kept safely afloat at all times.

Seasoned lumber to be delivered when in stock.

Each dimension, length, and kind, as given in the orders placed by the supply officer, to be segregated on the scow.

Bidders must insert in the blank spaces in the above paragraphs the reduction or increase in prices they will agree to.

Initial point of shipment ———.

Address ———.

For general conditions see front page of this schedule.

It is further provided that the bidder to whom contract for this class may be awarded shall agree to make shipment of the material by American lines of transportation, not excluding such lines as have connections running outside of the United States.

No bid will be considered except from parties or representatives of firms operating mills cutting Douglas fir lumber and located within four days' transportation from the above-mentioned navy yard.

15 *General Conditions Covering All Classes of This Schedule.*

Liquidated damages for delayed delivery provided by Form A will not apply.

Lumber purchased in accordance with the specifications will, unless otherwise directed by the Bureau of Construction and Repair, be inspected at the initial point of shipment, subject to the following:

(a) On contracts or orders covering not less than 25,000 feet b. m. of lumber offered for inspection within a radius of 150 miles from navy yards where timber inspectors are located, i. e., navy yards, Charleston, S. C., Norfolk, Va., and Portsmouth, N. H.

(b) On contracts or orders covering not less than 50,000 feet b. m. of lumber offered for inspection within a radius of 500 miles from the above yards.

(c) On contracts or orders covering not less than 100,000 feet b. m. of lumber offered for inspection within a radius of 1,000 miles from the navy yards, Norfolk, Va., and Charleston, S. C.

(d) No mill inspection will be authorized on lumber offered for inspection at mills distant more than 1,000 miles from the above-mentioned yards. Such lumber will be inspected after delivery.

No mill inspection by the Government inspector will be ordered or conducted until the name of the mill and the place of shipment, together with the certified copy or order required below, have been furnished by the Bureau of Construction and Repair. Any delay caused by the failure of the contractor to furnish the Bureau of Construction and Repair these data immediately on award of contract will not be considered attributable to the Government in adjustment of the contract.

When the Government timber inspector finds at the mill of the subcontractor that the specifications furnished the mill by the contractor do not agree with the contract specifications and the certified copy of order placed with the subcontractors previously furnished the Bureau of Construction and Repair, the entire lot of
16 lumber concerned will be rejected without further inspection or handling.

A reinspection will not be undertaken at the mill except at the contractor's expense and after specific approval of the Bureau of Construction and Repair.

Bidders must state on the blank lines provided under each class the name of the mill and the place from which the material will be shipped. If the material will be supplied from stock and not specially manufactured, the exact location where the finished material is in stock must be stated.

The contractor must provide the necessary facilities and labor, so that a proper inspection may be held in the event of inspection being made by the Government before shipment.

If inspection is authorized at initial point of shipment, shipment made without authority from the Government inspector may result in return, at contractor's expense, of material to initial point of shipment for inspection.

In connection with the inspection of the material, if incorrect information is given, thereby causing one or more useless trips by the inspectors, the Government reserves the right to charge the expenses of such useless trips to the contractor, and further inspection at the mills may be denied the contractor, at the option of the Government.

If award is made under the rules of the National Hardwood Lumber Association, the inspection will be conducted by a licensed inspector of this association, the cost of inspection to be borne by the contractor and to be included in his bid.

If it is not practicable to arrange for inspection at the mill by a Government inspector under the rules of the Hardwood Manufacturers' Association, the lumber is to be shipped subject to in-

spection at point of delivery by a Government timber inspector. In case of controversy, the services of a licensed inspector of the Hardwood Manufacturers' Association will be obtained, if necessary, his final decision to be final, the cost of such inspection to be borne by the party to the contract against whom such decision is made.

17 The contractor must furnish the Bureau of Construction and Repair, Navy Department, Washington, D. C., with a certified copy of the order placed with the mill which will supply the lumber. Inspection will not be ordered until this certificate is furnished. This certified copy of order need not include the price, terms, etc., but must include the specifications under which the material is ordered.

2. It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications, the "Instructions, Deliveries, and Conditions," printed on the proposal of the said party of the first part, shall be deemed and taken as forming a part of this contract with like operation and effect as if the same were incorporated herein; and, in any case where the specifications do not explicitly provide to the contrary, all workmanship and materials entering into the manufacture or construction of any article or articles under this contract, shall be of the very best commercial quality and manufacture; and said article, articles, or services shall upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the said party of the second part to inspect and examine the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers; and any of said articles not so approved shall be removed by the said party of the first part at its own expense, and within ten days after notification.

3. It is further covenanted and agreed, as aforesaid, that time is the essential element of this contract, and that, if the said party of the first part shall fail to make delivery of any or all the articles or materials or to perform any or all of the services herein contracted for, in conformity with the conditions and requirements of the contract, and within the time or times prescribed, the said party of the second part will be damaged thereby; and the amount of said damages is hereby affixed and agreed to in advance, as liquidated damages and not as penalty, and the said party of the second part shall make deductions from the contract price accordingly, as follows, viz:

18 For each day's delay, Sundays and holidays excepted, until satisfactory delivery or performance shall have been made, or until such time as the party of the second part may procure the same as hereinafter provided, at the rate of one-twentieth of 1 per cent of the contract price, the deductions, however, not to exceed in any case 10 per cent of the stipulated value of the articles or materials

not so delivered, or of the services not so performed; rejection of deliveries or performance not to be considered as waiving deductions: Provided, that no liquidated damages shall be deducted for such period, after the expiration of the time or times prescribed for delivery or performance, as, in the judgment of the party of the second part, shall equal the time that, either in the beginning or in the prosecution of the deliveries or services contracted for, shall have been lost on account of any cause for which the United States is responsible, or on account of strikes, riots, fire, or other disaster, delays in transit or delivery on the part of transportation companies, or any other circumstances beyond the control of the contractor, but such circumstances shall not be deemed to include delays on the part of subcontractors in furnishing materials, when such delays arise from causes other than those herein specified: And provided further, that the question whether delays are due to causes herein specified shall be determined by said party of the second part.

4. It is further covenanted and agreed that if the said party of the first part shall fail in any respect to perform the contract, the same may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover

for defaults therein or violations thereof, or the said party of the second part may purchase or procure in such manner and from such person or persons as he deems proper, paying such price therefor as may be necessary in order to procure the same, such of said articles or materials of the kind specified as near as practicable, or procure the performance of such services, as the said party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price stipulated in the contract; and the amount of such difference shall be paid by the said party of the first part to the said party of the second part on demand.

5. It is further covenanted and agreed that the said party of the first part shall indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States that may be affected by the adoption or use of the articles herein contracted for.

6. It is further covenanted and agreed that in carrying out the provisions of (the) contract no person shall be employed who is undergoing sentence of imprisonment at hard labor which has been imposed by a court of the United States, of any States, Territory, or municipality having criminal jurisdiction; that the contract is upon the express condition that no Member of or Delegate to Congress, nor any person belonging to or employed in the naval service is, or shall be, admitted to any share or part therein or to any benefit to arise therefrom except as a member of a corporation; and that any transfer of the contract, or of any interest therein, to any person or party by the said party of the first part shall annul the same, so far as the United States is concerned.

7. And this contract further witnesseth, that the United States, party of the second part, in consideration of the foregoing stipulations, do hereby covenant and agree, to and with the party of the first part, as follows, viz:

That upon the presentation of the customary bills and the proper evidence of the delivery, inspection, and acceptance of said
20 article, articles, or services, and within ten days after such evidence shall have been filed in the Bureau of Supplies and Accounts, there shall be paid to the said The Charles Nelson Co. or to its order, by the Navy Pay Officer at Washington, D. C. (Disbursing Office), the sum of Forty-five Thousand (\$45,000.00) Dollars, or the sum found to be due under this contract: Provided, however, That no payments shall be made on any one of said classes until all the articles or services embraced in such class shall have been delivered or performed and accepted, except at the option of the party of the second part.

In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

(See Note.)

THE CHARLES NELSON CO. [L. S.]
JAMES TYSON, [L. S.]

President.

S. MCGOWAN, [L. S.]
*Paymaster General, U. S. Navy, Chief of
the Bureau of Supplies and Accounts.*

Signed and sealed in the presence of—

F. G. THORNTON,

As to Party of the First Part.

KIRK HOLMES,

As to Paymaster General, U. S. Navy.

NOTE.—Contracts and bonds signed by a firm must be duly signed in the firm name and by each member of the firm, each signature to be sealed with wax or wafer seal. Contracts signed by a corporation shall be signed with the corporate name, by an officer thereof or a duly authorized agent, and sealed with the corporate seal; evidence of authority for signature to be appended.

Bond.

Know all men by these presents, That we, The Charles Nelson Co., as principals, and Fred Linderman and Mitchell Thompson as sureties, all of —, are held and firmly bound, etc.,
21 unto the Secretary of the Navy in the penal sum of Eleven Thousand Three Hundred Dollars, to be paid to the Secretary of the Navy, or his successors; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of Feb. A. D. 1917,

Conditions.

The conditions of the above bond are such, that if the said above-bounden The Charles Nelson Co., their heirs, executors or assigns, shall well and truly, and in a satisfactory manner, fulfill the contract hereto annexed, and deliver the articles or perform the services mentioned in the annexed schedule within the time specified, and to the satisfaction of the said Chief of the Bureau of Supplies and Accounts, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

THE CHARLES NELSON CO.	[SEAL.]
JAMES TYSON,	[SEAL.]
<i>President.</i>	
FRED LINDERMAN.	[SEAL.]
M. THOMPSON.	[SEAL.]

Signed and sealed in the presence of
L. SEGELHURST.

Justification of the Sureties.

(Must be Sworn to Before a Notary Public or Other Officer Authorized to Administer Oaths.)

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

I, Fred Linderman, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of Eleven Thousand Three Hundred Dollars over and above all my debts and liabilities; that I am not a copartner of the said The Charles Nelson Co. and that I have no contract at this time with the Bureau of Supplies and Accounts.

FRED LINDERMAN,
Surety.

Subscribed and sworn to before me this 21st day of Feb., A. D. 1917.

MARGARET S. BREMER,
*Notary Public in and for the City and
County of San Francisco, California.*

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

I, Mitchell Thompson, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of Eleven Thousand Three Hundred Dollars, over and above all my debts and liabilities; that I am not a copartner of the said The Charles Nelson

Co., and that I have no contract at this time with the Bureau of Supplies and Accounts.

MARGARET S. BREMER,
*Notary Public in and for the City and
County of San Francisco, California.*

Certificate.

(Must be signed by a United States officer on all cases where individuals are named as bondsmen. Unnecessary if corporate surety bond is furnished.)

I, N. S. Farley, Deputy Collector of U. S. Customs, do hereby certify that Fred Linderman and Mitchell Thompson, the sureties above named, are personally known to me by reputation, and that, to the best of my knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

N. S. FARLEY,
Deputy Collector of Customs.

Treasury Department, United States Custom Service, Port of San Francisco, Cal. Feb. 21, 1917.

23 CLAIMANT'S EXHIBIT B.					
Date of order.	Date of shipment.	Grade.	Footage.	Differences per M bet. contract and market price.	Amount of difference.
1917.	1917.				
June 2	June 19	Common	44,004	\$3.00	\$132.01
May 26	June 21	Merchantable ..	77,515	3.00	232.55
May 26	June 21	No. 1 VG, KD			
		Flooring	25,040	6.50	162.76
May 15	June 28	Clear Decking..	1,011	4.50	4.55
		Ship Plank.....	900	2.50	2.25
		Clear S4S.....	13,483	4.50	60.72
		Clear	57,328	4.50	257.98
June 5	July 5	Clear	62,176	5.50	341.97
		No. 1 Clear			
		Ceiling KD..	25,132	12.50	314.15
May 5	July 5	Ship Plank....	490	3.50	1.72
		Clear S4S.....	4,023	3.50	22.13
		Clear	19,181	5.50	105.50
June 2	July 14	Common	133,104	4.00	532.42
May 26	July 16	Merchantable ..	106,803	4.00	427.21
May 2	Aug. 9	No. 1 VG, KD			
		Flooring	50,052	8.50	425.44
June 21	Aug. 14	Clear Decking..	890	6.50	5.79
		Select	2,602	6.50	16.91
		Clear	47,072	6.50	305.97
		Merchantable ..	1,333	4.00	5.33
Aug. 13	Oct. 8	Merchantable ..			
		Ties	125,189	4.50	568.35
		Merchantable ..	1,540	5.00	7.70

Date of order.	Date of shipment.	Grade.	Footage.	Differences per M bet. contract and market price.	Amount of difference.
1917.	1917.				
June 21	Oct. 29	Clear Decking.	2,363	8.50	20.09
		Clear S4S.....	19,377	8.50	164.70
		Merchantable .	800	5.00	4.00
		Clear	56,204	8.50	477.73
		Select	1,024	8.50	8.70
June 2	Oct. 29	Common	50,856	5.00	254.28
June 28	Oct. 31	Merchantable .	40,829	5.00	204.15
June 29	Oct. 31	Merchantable .	29,826	5.00	140.13
24					
		Clear	25,542	8.50	217.11
June 29	Nov. 12	Merchantable .	58,269	9.00	524.42
June 28	Nov. 12	Merchantable .	39,804	9.00	358.23
June 29	Nov. 19	Merchantable .	93,435	9.00	840.92
June 29	Nov. 19	Clear	4,590	11.50	52.79
Aug. 9	Nov. 26	Merchantable .	122,997	9.00	1,106.97
Aug. 9	Dec. 13	Merchantable .	87,389	9.00	786.50
Aug. 4	Dec. 13	No. 1 Clear Ceiling KD..	51,440	18.50	951.64
		Clear	1,170	11.50	13.46
June 29	Dec. 13	Clear	450	11.50	5.18
		Merchantable .	6,533	9.00	58.80
June 21	Dec. 27	Clear S4S.....	1,584	11.50	18.22
		Clear Decking.	792	11.50	9.11
		Clear	13,176	11.50	151.52
May 2	Dec. 27	Clear	52,001	11.50	598.01
Aug. 9	Dec. 28	Merchantable .	71,846	9.00	646.61
Aug. 4	Dec. 23	Clear	62,037	11.50	713.43
June 29	Dec. 28	Merchantable .	5,227	9.00	47.04
Aug. 9	Dec. 29	Merchantable .	26,602	9.00	239.42
		Merchantable S1S1E	23,936	9.00	215.42
June 29	Dec. 29	Merchantable .	7,741	9.00	69.67
Aug. 4	Dec. 29	Clear	7,020	11.50	80.73
May 2		Clear	204,497	13.50	2,760.71
June 21		Clear Decking.	20,955	13.50	282.89
		Clear	65,087	13.50	878.67
May 6		VG Clear Decking	37,000	13.50	499.50
		Merchantable .	15,596	11.00	171.56
June 29		Merchantable .	1,636	11.00	18.00
		Clear	4,418	13.50	59.64
Aug. 4		No. 1 VG, KD Flooring	50,000	15.50	775.00
		Clear	114,773	13.50	1,549.44
Aug. 9		Merchantable .	37,230	11.00	409.53
Total ...			2,314,930 feet		\$20,321.33

25

III. Argument and Submission of Case.

On October 25, 1921, this case was argued and submitted on merits by William E. Humphrey, Esq., for plaintiff, and by J. Robert Anderson, Esq., for defendant.

IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.*

Entered November 21, 1921.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a corporation duly organized and existing under the laws of the State of California. During the period here involved it maintained intimate business relations with the Crown Lumber Company, operating a mill at Mukilteo, Washington, and the Puget Sound Mills and Timber Company, operating a mill at Port Angeles, Washington, and these relations, the foundation of which is not satisfactorily shown, were such that the plaintiff at times filled its orders by directing one of the companies named, called by it "subsidiary companies," to furnish the required materials.

A. A. Scott was a stockholder and the authorized agent of the plaintiff company and was the manager of the Crown Lumber Company.

II.

On January 3, 1917, after due advertisement, formal competitive bids were opened by the Navy Department for the furnishing and delivering of Douglas fir lumber to the United States, alongside wharf, navy yard, Puget Sound, State of Washington, in such quantities and at such times during the period ending December 31, 1917, as the supply officer might direct. Plaintiff's bid being the lowest it was accepted and plaintiff was thereupon awarded the contract.

III.

On February 23, 1917, a formal contract in writing, numbered 28942, was entered into between the plaintiff and the Navy Department represented by the Paymaster General, Chief of the Bureau of Supplies and Accounts, a copy of which contract is attached to the original petition herein as "Exhibit A" and is made a part hereof by reference. The contract was the usual form of contract used by the Navy Department for procuring needed supplies during a given period, and the plaintiff in previous years had procured, entered into, and performed similar contracts.

IV.

About the time of the execution of the contract the plaintiff company, on one of its usual order forms, directed the Crown Lumber

Company to furnish 1,675,000 feet, board measure, of Douglas fir, as the same might be ordered from time to time by the supply officer at the Puget Sound Navy Yard, and the supply officer was notified that A. A. Scott, general manager of the Crown Lumber Company, was the authorized representative of the plaintiff company in the matter of the furnishing of lumber under its contract.

Thereafter the supply officer at the navy yard from time to time transmitted orders for lumber to the Crown Lumber Company which were filled and the invoices therefor were signed by the Charles Nelson Company, by A. A. Scott, its agent.

V.

By May 21, 1917, the Crown Lumber Company had delivered approximately 950,000 feet and received and accepted orders in addition thereto for the delivery of 1,186,000 feet.

There had been some delay in deliveries by the Crown Lumber Company, of which complaint had been made to the plaintiff, in reply to which the plaintiff had reported labor trouble at the Crown Lumber Company's plant as a cause of delay and that it had directed Mr. Scott, manager of that company, "as also the Puget Sound Mills and Timber Co.," to do everything possible to expedite deliveries and asking indulgence "a little while longer."

On May 17 the commandant of the navy yard wired the plaintiff "We are withholding orders approximately 115 M feet rough dimension and 15 M feet finish fir lumber on account congestion Crown Lumber Company mill. Delivery desired by June 1st. Can you arrange to furnish this and future urgent orders under contract 28942 from other mills until such time situation at Crown Lumber Co. is relieved?" to which on the 18th plaintiff replied by wire, "Please confer with A. A. Scott, general manager Puget Sound Mills & Timber Co., Port Angeles," and on the 19th wrote, quoting these messages and stating:

"Immediately on receipt of your telegram we wired Mr. A. A. Scott, general manager of the Puget Sound Mills & Timber Co., Port Angeles, to do everything he possibly could to furnish the orders you are withholding, as also other business that he may have on his books for the department. Would be pleased to have you confer direct with Mr. Scott relative this business."

The orders referred to in the last-quoted paragraph and orders theretofore received and the quantity of lumber delivered exceeded 1,675,000 feet, and the plaintiff up to this time had made no protest against filling orders in excess of that quantity. Delays in

27 deliveries, pleas for indulgence, and means of expediting the filling of orders were the subjects of correspondence.

On May 21, 1917, the Crown Lumber Company, "by A. A. Scott, manager," wrote the supply officer at the navy yard as follows:

"Dear Sir: By referring to this contract, which calls for 1,675 M feet of lumber in sizes or grades as may be required, in amount up to but not to exceed 1,675 M feet, as needed during a period ending

Dec. 31, 1917. Up to the present time, including the one scow load which we will deliver to-day, we have delivered against this contract approximately 950 M. We have orders which you have sent us for delivery of approximately 1,186 M. There is due on this contract only 725 M, so that you will have to recall approximately 461 M of these orders which you have sent us, as we can not apply them against this contract, for we can not exceed the amount of the original contract, viz, 1,675 M feet.

"Would kindly ask you to advise us what proportion of these orders which we now have unfilled on our books that you wish to withdraw."

On May 22 the supply officer replied to this letter, quoting from plaintiff's contract the following provision:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

And saying:

"Your request, therefore, will not be complied with, inasmuch as the contractor, the Charles Nelson Company, is bound to deliver any quantity of lumber which may be ordered under this contract as per terms mentioned above.

"A copy of this letter is being furnished the contractor, the Charles Nelson Company, 230 California Street, San Francisco, with the request that the situation be relieved by removing from your hands orders covering sufficient lumber to insure prompt delivery under all orders outstanding."

When the letter of May 21st above referred to was written, Mr. Scott did not know of the provision in plaintiff's contract quoted in the letter of the supply officer of the Navy of May 22d, and he disclaims any knowledge of that provision until September 25, 1917.

On May 23, 1917, the supply officer at the navy yard wired the plaintiff that the Crown Lumber Company and the Puget Sound Mills & Timber Company had declined to fill orders for approximately three hundred thousand feet, and that "unless immediate arrangements are made to effect delivery by June tenth it will be necessary to purchase in open market against your account."

On June 2d the supply officer, addressing the Crown Lumber Company and forwarding therewith order No. 6, under contract 28942, for 287,940 feet of lumber, said:

"This order is submitted in accordance with telephone conversation of Mr. A. A. Scott, of the Puget Sound Mill and Timber Company, of Port Angeles. It is understood from Mr. Scott that the delivery conditions specified above could be complied with, but if for any reason it is not possible to make deliveries

as specified you will please notify this office by return mail in order that steps may be taken to procure the lumber in the open market."

On June 7, 1917, acknowledging this order, the Crown Lumber Company, "by A. A. Scott, vice pres. & genl. manager," said "We are accepting this order under protest, especially as to delivery date."

Order No. 7, dated June 5th, was on June 11th accepted by the Crown Lumber Co., by A. A. Scott, manager, "under protest"; order No. 8, of June 21st, was, on June 26th, over the same signature, accepted "under protest, especially as to delivery"; and order No. 9, of June 28th, was on July 2d, over the same signature, accepted "under protest, especially as to delivery."

On June 18, 1917, the plaintiff company wrote the supply officer as follows:

"Dear Sir: Contract 28942. We have for acknowledgment your letter of the 14th, in which you transmit instructions received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., in which you are instructed as follows:

"Contract 28942, if contractor fails to make delivery, purchase authorized as requested."

"May we be permitted to state that it has never been our intention or aim to fail to make delivery of your requirements as we may be committed to under the contract above quoted? Mr. A. A. Scott, our resident agent on Puget Sound, has been instructed to give your business the right of way, both at the Mukilteo and Port Angeles plants.

"Mr. H. W. Jackson, our vice president, was on the Sound recently, and he states that at both mills nothing is left undone in order to produce the lumber that you have ordered under the contract.

"By way of further explanation we might say that when we entered into this contract with your department we never dreamt that we would be expected to deliver extraordinary quantities of clear lumber of long lengths, such as planking, decking, etc., within the time limits specified in the contract. In connection with these orders we feel that we are entitled to some consideration and a little leniency. The contract itself states that we are committed to making deliveries on your orders 50 M feet per B. M. or less of assorted sizes, not more than 10 M feet B. M. of any one size except with the contractor's consent, which must be delivered within ten days after date of receipt of order, and that all other orders must be delivered within twenty-five days after date of receipt of order from the supply officer. Therefore we submit that when you order 100 M feet of decking or ship lumber of long lengths and ask us to furnish same within ten days you are requiring more of us than is specified in the written contract.

"For this special material, if you were to buy this in the open market to-day, you probably would penalize us \$10.00 per M. We feel sure that it is not the desire of your department to arbitrarily penalize us to that extent, in view of the fact that we are doing our utmost to execute your orders within the time limits.

"We feel that we are not responsible for the extraordinary conditions which have arisen since the contract was executed.

29 We are reliably informed that the War Department has canceled their contracts and is now redistributing their requirements, having in view existing conditions. We also feel that your department should interpret our engagement in the same way. We trust you will accept this communication in the spirit in which it is sent. We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your cooperation to assist us in completing our engagements."

VI.

In June, 1917, A. A. Scott, manager of the Crown Lumber Company, and H. W. Jackson, vice president of the plaintiff company, had a conference at the navy yard with the chief clerk, the supply officer, and the naval constructor of the yard.

The conference was brought about by reason of the apparent inability of the contractor to deliver lumber as rapidly as needed at the yard and for the purpose of urging action that would result in more rapid deliveries.

During this conference Mr. Scott protested against being required to deliver any more than 1,675,000 feet at the contract price. The representatives of the Government maintained that the matter was covered by the contract and no promise of any kind was made to pay more than the contract price. Large quantities of lumber were thereafter delivered on orders theretofore and thereafter placed under the contract. No protest against furnishing more than 1,675,000 feet of lumber under the contract was ever made by the plaintiff company itself or any of its officers and it does not appear that Mr. Scott was directed to make such a protest at the conference above referred to or that he was acting within his authority in so doing.

VII.

The plaintiff company furnished to the defendant on orders placed by the defendant under contract 28942, 3,688,259 feet of lumber, for which it was paid at the contract price, and it did not at the time of any payment make to the United States any protest against payment at that price, and so far as the United States was informed such payments were accepted as in full.

The amount of lumber furnished over and above 1,675,000 feet was worth at market price, delivered at the navy yard, \$18,310.21 more than the plaintiff was paid therefor at contract price.

VIII.

After the execution of the contract and as a development of the World War the Government entered upon the building of submarine chasers at this navy yard a type of vessel never before built there, and much of the lumber required of the plaintiff under its contract was used in the construction of these vessels.

IX.

To relieve to some extent the congestion at the mills of the Crown Lumber Company and the Puget Sound Mills & Timber Company, and to expedite the procurement of needed materials, the defendant canceled some orders placed under the contract and bought materials in the open market at prices above the contract price, and it at one time sent men to the plant of one of these companies to help load lumber and thus facilitate deliveries.

Conclusion of Law.

On the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that its petition ought to be dismissed with judgment against it for the cost of printing to be taxed by the clerk, and it is so ordered.

Opinion.

Downey, *Judge*, delivered the opinion of the court:

The plaintiff furnished lumber to the Puget Sound Navy Yard during 1917, for all of which it was paid at the prices named in a contract entered into between it and authorized representatives of the United States in February of that year. It seeks to recover in this action the difference between what it was paid and the alleged market value of all of said lumber in excess of 1,675,000 feet, the amount it alleges it was obligated to deliver under the contract, if in fact it was obligated at all.

The contract, which followed competitive bids after due notice, was the usual form of bureau contract for the procurement of needed supplies during a given period. The articles called for were about 1,675,000 feet of Douglas fir of such sizes or grades as might be ordered, and the contract contained the following clause:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending Dec. 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

The plaintiff first contends that this clause is void for want of mutuality in that the United States was not obligated. Such a contention is not tenable. The purpose of the contract was to procure such lumber during a given period as might be needed at a place where lumber had always been needed and where, so far as human foresight could know, lumber would be needed during the period covered by the contract. The plaintiff, with former experience under such contracts, sought by its bid the right to supply such needs, its contract secured to it such rights, and they were

enforceable thereunder. But however that may be it is certainly too late for plaintiff to raise such a question after it has furnished under the contract all which, according to its construction, it was obligated to furnish and been paid therefor at the contract price.

The question then is as to the construction of the contract and the plaintiff's obligations thereunder. It contends that its obligation was limited to the furnishing of 1,675,000 feet of lumber. The defendant contends that plaintiff's obligation was measured by the needs of the navy yard during the stated period.

31 There seems to be but little room for discussion. The plain purpose of the contract was to supply a need during the period named and not to furnish a specific quantity. The clause quoted is susceptible of no other construction. It is not attempted to show that plaintiff did not so understand it when it submitted its bid and entered into the contract. And in fact it is open to reasonable inference from the facts found that during the term of the contract the plaintiff itself at all times recognized its obligation under the contract to supply the needs of the navy yard.

It is true that Mr. Scott, who was the agent of the plaintiff and also the manager of the Crown Lumber Company, undertook to limit the liability of the plaintiff under the contract to the furnishing of 1,675,000 feet of lumber, but it is equally true, according to his own testimony, that he did not then know of the provision in the contract quoted above, and it fairly appears that his position in the matter was contrary to that of his principal and entirely out of line with instructions given him.

Upon the execution of the contract the plaintiff issued to the Crown Lumber Company, some sort of a subsidiary of the plaintiff, an order to furnish the navy yard 1,675,000 feet of lumber, and this order came to Mr. Scott as the manager of the Crown Lumber Company for his attention. It is not in the record. We have not found whether it specifically limited the amount to be furnished to the quantity stated. Assume that it did. It is immaterial. It was an order by the plaintiff to one of its subsidiaries; the United States was in no sense a party and the liability of the plaintiff under its contract could not be limited thereby.

It was by letter of May 21, 1917, that Mr. Scott first undertook to limit the liability of the plaintiff to 1,675,000 feet. Deliveries made and accepted orders then on hand exceeded that amount, and he demanded the withdrawal of orders sufficient to reduce the amount to 1,675,000 feet. His attention was promptly called to the provision of the contract quoted above. With the orders sent by plaintiff to Mr. Scott as manager of the Crown Lumber Company no copy of the contract had been sent and Mr. Scott did not know of the quoted provision. It must be assumed that he was interpreting the contract liability of the plaintiff by the terms of the order issued to the Crown Lumber Company, of which he was manager. Thereafter he accepted orders, indicating in most instances that the acceptance was under protest, especially as to delivery. And delivery dates seem to have been more a subject of controversy than anything else. But, rather peculiarly, while Mr. Scott is attempting to thus limit plain-

tiff's liability, the plaintiff itself, although informed of Scott's attitude, makes no such contention, but on June 18, 1917, writes to the supply officer the letter set out in Finding V, in which it, as it seems to us, clearly repudiates Scott's position. While the position assumed by the plaintiff could not be determinative of the question of its obligation, the construction which is put upon the contract is strengthened, if in fact that was also the construction put upon it by the plaintiff.

But whether the contract obligated the plaintiff to the extent of the needs of the navy yard or only to the extent of 1,675,000 feet of lumber, the undisputed facts are that the defendant's representatives construed plaintiff's obligation as measured by the needs, irrespective of the estimated quantity stated, of which the plaintiff was fully informed, all orders were placed with direct reference to and under this contract, and the orders, except as withdrawn, were filled. If the plaintiff's obligation under its contract was in fact to furnish 1,675,000 feet of lumber and no more, it would have been entirely within its rights, having furnished that amount, to refuse to furnish more. And having furnished additional quantities in compliance with orders specifically predicated on the contract, it can not while complying with such orders create or preserve by so-called protest a right to additional compensation over and above the contract price. We have so held in the recent case of Willard, Sutherland & Co. v. United States, decided November 7, 1921.

While not cited as necessarily precluding the plaintiff, it is for consideration that payments for all this lumber at contract price were accepted without protest, so far as the defendant was informed. It is said that the plaintiff accepted these as partial payments only, but the proof goes no further than to indicate either an unexpressed mental reservation or an afterthought.

Our conclusion is necessarily against any right of recovery by the plaintiff.

Graham, Judge; Hay, Judge; and Campbell, Chief Justice, concur. Booth, Judge, dissents.

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V. Judgment of the Court.

At a Court of Claims held in the City of Washington on the Twenty-first day of November, A. D., 1921, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the Charles Nelson Company, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same is hereby dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of One Hundred and seventy-one dollars and forty-four cents (\$171.44), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Proceedings After Entry of Judgment.*

On January 9, 1922, the plaintiff filed a motion for a new trial and for modification of the findings of fact. This motion was overruled by the Court on January 16, 1922.

VII. *Plaintiff's Application for and the Allowance of an Appeal.*

Comes now the plaintiff, by its attorneys, and notes an appeal to the Supreme Court of the United States from the judgment in the above entitled cause, and showing to the court that more than \$3,000 is involved therein, prays the court to allow its said appeal and certify the record to the Supreme Court of the United States.

W. E. HUMPHREY,
WILLIAM C. PRENTISS,
Attorneys for Plaintiff.

Filed and submitted in open Court February 6, 1922.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

February 13, 1922.

34

Court of Claims.

No. 34047.

THE CHARLES NELSON CO.

VS.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the opinion of the Court by Downey, J.; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this fifteenth day of February, A. D., 1922.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,742. Court of Claims. Term No. 787. The Charles Nelson Company, appellant, vs. The United States. Filed February 28th, 1922. File No. 28,742.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 287.

THE CHARLES NELSON COMPANY, APPELLANT
vs.
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

Statement of the Case.

The claim here in suit grew out of a so-called contract of February 23, 1917 (Rec., p. 7), for 1,675 M feet (about) of Douglas fir, to be furnished as ordered by the Supply Officer at the Puget Sound Navy Yard during the remainder of the year 1917, and focuses on the stipulation therein that:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

The contract provided that:

"Bidders must state on the blank lines provided under each class the name of the mill and the place from which the material will be shipped. If the material will be supplied from stock and not specially manufactured, the exact location where the finished material is in stock must be stated,"

and,

"The contractor must furnish the Bureau of Construction and Repair, Navy Department, Washington, D. C., with a certified copy of the order placed with the mill which will supply the lumber. Inspection will not be ordered until this certificate is furnished. This certified copy of order need not include the price, terms, etc., but must include the specifications under which the material is ordered."

Accordingly, upon the execution of the so-called contract, the appellant (located at San Francisco), on one of its usual order forms, directed the Crown Lumber Company, a subsidiary, at Mukilteo, Washington, to furnish 1,675,000 feet B. M. of Douglas fir, as the same might be ordered from time to time by the Supply Officer at Puget Sound Navy Yard (Finding IV, Rec., pp. 17-18).

Presumably a copy of that order was furnished to the Bureau of Yards and Docks as required by the contract.

And the Supply Officer was notified that A. A. Scott, General Manager of the Crown Lumber Company (who was also General Manager of the Puget Sound Mills and Timber Company at Port Angeles, Washington, another subsidiary), was the authorized representative of the appellant in the matter of furnishing lumber under the contract (Finding IV, Rec., p. 18).

Thereafter the Supply Officer, from time to time, transmitted orders for lumber to the Crown Lumber Company, invoices for which when filled, were signed,

"Charles Nelson Company, by A. A. Scott, its agent" (Finding V, Rec., p. 18).

Upon the declaration of war (April 6, 1917), activity at the Navy Yard was extended, among other things, to the building of submarine chasers, requiring large quantities and unusual sizes of lumber (Finding VIII, Rec., p. 21); and instead of deliveries under the contract being spread out during the contract period (1917), orders aggregating the contract quantity, 1,675,000 feet, were transmitted to the Crown Lumber Company prior to May 21, 1917.

Although the market value of lumber rose materially following the declaration of war, the appellant raised no question as to the unilateral character imposed upon the contract by the stipulation first before quoted, but performed its undertaking to furnish the 1,675,000 feet called for by the contract.

The sudden demand for immediate delivery of the whole amount contracted for taxed the facilities of the appellant's subsidiaries, and labor troubles contributed to delays in deliveries, which were the subject of correspondence in May, 1917 (Finding V, Rec., p. 18).

The Supply Officer and his superiors, however, had undertaken to construe the stipulation referred to as obligating the plaintiff to furnish any quantity, without limit, that might be ordered; and, without notice to the appellant, had proceeded to transmit to the Crown Lumber Company orders in excess of the 1,675,000 feet specified in the contract.

On May 17, the commandant of the Navy Yard wired the plaintiff (Finding V, Rec., p. 18):

"We are withholding orders approximately 115 M feet rough dimension and 15 M feet finish fir lumber on account congestion Crown Lumber Company mill. Delivery desired by June 1st. Can you arrange to furnish this and

future urgent orders under contract 28942 from other mills until such time situation at Crown Lumber Company is relieved?"

On May 18th the plaintiff wired the commandant to confer with Mr. Scott, General Manager of the Puget Sound Mills & Timber Company, at Port Angeles, Washington, and on the 18th a letter was written from the office of the plaintiff company at San Francisco, quoting the above telegrams and stating (Finding V, Rec., p. 18):

"Immediately on receipt of your telegram we wired Mr. A. A. Scott, General Manager of the Puget Sound Mills & Timber Company, Port Angeles, to do everything he possibly could to furnish the orders you are withholding, as also other business that he may have on his books for the department. Would be pleased to have you confer direct with Mr. Scott relative this business."

It thus appears that Mr. Scott was then at Port Angeles. Evidently he returned to Mukilteo on May 21st, and discovered that orders in excess of 1,675,000 feet had been transmitted to the Crown Lumber Company, for on that day he wrote the Supply Officer as follows (Finding V, Rec., pp. 18-19):

"Dear Sir: By referring to this contract which calls for 1,675 M feet of lumber in sizes or grades as may be required, in amount up to but not to exceed 1,675 M feet, as needed during a period ending December 31, 1917. Up to the present time, including the one scow load which we will deliver today, we have delivered against this contract approximately 950 M. We have orders which you have sent us for delivery of approximately 1,186 M. There is due on this contract only 725 M, so that you will have to recall approximately 461 M of these orders which you have sent us, as we cannot apply

them against this contract, for we cannot exceed the amount of the original contract, viz., 1,675 M feet.

"Would kindly ask you to advise us what proportion of these orders which we now have unfilled on our books that you wish to withdraw."

On May 22nd, the Supply Officer replied, quoting the stipulation first herein quoted, and saying (Finding V, Rec., p. 19):

"Your request, therefore, will not be complied with, inasmuch as the contractor, the Charles Nelson Company, is bound to deliver any quantity of lumber which may be ordered under this contract as per terms mentioned above.

"A copy of this letter is being furnished the contractor, the Charles Nelson Company, 230 California Street, San Francisco, with the request that the situation be relieved by removing from your hands orders covering sufficient lumber to insure prompt delivery under all orders outstanding."

And on May 23, the Supply Officer wired the appellant (Finding V, Rec., p. 19) that the Crown Lumber Company and the Puget Sound Mills and Timber Company had declined to fill orders for approximately 300 M feet and that unless immediate arrangements were made to effect deliveries, it would be necessary to purchase in open market, charging against the appellant's account. It will be observed that the letter and telegram did not disclose that orders in excess of 1,675,000 feet had been sent to the Crown Lumber Company.

Orders No. 6 of June 2, No. 7 of June 5, and No. 8 of June 21, were by Mr. Scott accepted under protest (Finding V, Rec., pp. 19-20).

Some time in the early part of June, Mr. Scott and Mr. H. W. Jackson, Vice-President of the appellant, had a conference at the Puget Sound Navy Yard with

the Chief Clerk, the Supply Officer, and the Naval Constructor stationed there, during which Mr. Scott, speaking for the appellant, reiterated his protest against being required to deliver more than 1,675,000 feet at the contract prices, and the representatives of the Government maintained that the matter was covered by the contract (Finding VI, Rec., p. 21).

This conference occurred prior to June 18, for the letter of that date, incorporated in Finding V (Rec., p. 20), refers to Jackson's having been on the Sound "recently," and evidently prior to the communication from the Supply Officer under date of June 14, referred to therein, wherein the plaintiff was informed that the Supply Officer had been instructed by the Navy Department, that, if the contractor failed to make delivery, purchase in the open market was authorized.

The court below refused to incorporate in its findings the communication of June 14 (set out in full in the petition, par. 11, Rec., p. 4), thereby violating the rule of evidence that where a letter is admitted to letter to which it was a reply should also be admitted.

The communication of June 14 was evidently written after the conference at the Navy Yard, for the purpose of making a further record of the position taken by the Government's representatives, but was so phrased as not to carry any suggestion that it had reference to orders in excess of the 1,675,000 feet called for by the contract.

The parties thus definitely established their attitudes, the appellant maintaining that it was not obligated to furnish in excess of the 1,675,000 feet called for by the contract, and the Government officials insisting that the contract obligated the appellant to furnish any amount, without limit, that might be ordered, and threatening, in case of refusal or failure, to purchase in

the open market and charge the excess cost to the appellant and its sureties.

In this situation, faced with the alternative of being branded as a failing contractor, and having reserved its rights by protests, the appellant thereafter, on demand of the Government's representatives, furnished in excess of the 1,675,000 feet called for by the contract, lumber to the amount of 2,013,259 feet, the value of which, at market prices was, in the aggregate, \$18,310.21 in excess of the prices specified in the contract. The Government, adhering to the contention of its representatives, allowed therefor only the contract prices (Finding VII, Rec., p. 21).

The appellant bases its claim for recovery of the market price of the excess lumber furnished, upon the grounds that the amount which it undertook to furnish was limited to 1,675,000 feet, and that the contract was void for want of mutuality; and, in any event, that, as appears from Finding VIII (Rec., p. 21), much of the 1,675,000 feet and the excess (2,013,259 feet) furnished, was ordered for use, and used, in the construction of submarine chasers. There is no finding that any portion of such excess was used for any other purpose.

This type of vessel had never been built at the Puget Sound Navy Yard or elsewhere at the time the contract was executed, and the furnishing of lumber for such use was not within the contemplation of the parties at the time of the execution of the contract, and the coercion of the appellant into furnishing lumber for such new and unforeseen purposes in such extraordinary quantity was unconscionable.

The majority of the court below (Booth, J., dissenting) failing to appreciate the manifest injustice of requiring the appellant to furnish 3,688,259 feet of lumber under a contract for "about" 1,675,000 feet (even if such contract had been mutually binding), in their opinion

(Rec., p. 22) first held that the contract was mutually binding as one for such quantities of lumber "as might be needed," in the absence of any suggestion in the contract that "need" was to be the measure of mutual obligation and in the face of the stipulation which was that the contractor should furnish any quantities "which may be *ordered* for the naval service" but "the Government not being obligated to order any specific quantity"; and that the appellant, suing for the value of the excess lumber which it had been coerced into furnishing, was estopped from questioning the mutuality of the contract, because it had furnished the 1,675,000 feet called for by the contract.

The majority of the court below, thus holding that the contract was mutually binding and that the measure of the obligation of both parties was "the needs of the Navy Yard during the stated period," in the face of the plain specification of "1,675 M feet B. M. (about)" as the subject matter of the contract, then held that the appellant was obligated, irrespective of previous conditions and character of "the needs at the yard" to furnish any (unlimited—from zero to infinity) quantity that might be ordered for the entirely new and extraordinary needs of war preparations. The majority of the court below then, apparently as support for their ruling, advanced the astonishing proposition that the plaintiff did not attempt to show that at the time that it entered into the contract and submitted its bid it did not understand that it was so obligated under the contract.

It is then suggested by the majority of the court below that it is open to reasonable inference "from the facts found" that the appellant recognized its obligation under the contract to supply the needs of the Navy Yard even if not legally obligated by the contract. But the appellant showed its understanding of the limit of its undertaking when it issued its order to the Crown Lum-

ber Company to furnish, as ordered, only 1,675,000 feet, a certified copy of which order was, by the contract, required to be filed with the Bureau of Yards and Docks, and presumably was so filed and accepted without objection. If it is important, as the court below seems to think, to know what construction the appellant placed on the contract, it is here clearly shown that it believed it was obligated to furnish but 1,675,000 feet as ordered.

Curiously it is then said that Mr. Scott, the agent of the appellant, undertook to limit the liability of the appellant under the contract to the furnishing of 1,675,000 feet, but that, according to his own testimony, he did not then know of the stipulation in the contract first herein quoted.

He needed only to know that the subject-matter of the contract was 1,675,000 feet. But it appears that the stipulation in the contract was quoted in the Supply Officer's letter to him of May 22d, in response to Mr. Scott's protest of May 21st, yet, notwithstanding, Mr. Scott continued to protest by letter and did so personally at the conference at the Navy Yard early in June.

The majority of the court below then say it fairly appears that Mr. Scott's position in the matter was contrary to that of his principal, and entirely out of line with instructions given him. On the contrary, Mr. Jackson, Vice-President of the appellant, was present at the conference early in June, when Mr. Scott protested as spokesman for the appellant.

There is presented the legal paradox of finding that Mr. Scott was the authorized agent of the plaintiff, whose acts were its acts, and yet finding that his position, which was, therefore, the position of his principal, was contrary to the position of his principal.

The instructions given Mr. Scott were explicit, to furnish 1,675 M feet as ordered.

The majority of the court below, seeking to sub-

stantiate their assertion that Mr. Scott's position was entirely out of line with the instructions given him, then undertake to eliminate the order to furnish 1,675 M feet given by appellant to Mr. Scott, by suggesting that it was an order by the appellant to one of its subsidiaries, that the United States was in no sense a party thereto, and that the liability of the appellant under its contract could not be limited thereby.

Of course, the liability of the appellant could not be limited by the order given by it to its subsidiary, but it showed its construction of the contract by its instructions to Mr. Scott as "the authorized representative of the plaintiff company in the matter of the furnishing of lumber under its contract" (Finding IV, Rec., p. 18), and issued in compliance with the provisions of the contract, *supra*, which required that a certified copy of such order be furnished the Bureau of Construction and Repair.

If any presumption may be indulged, it is, in the absence of anything to the contrary, that such copy was duly furnished and accepted by the Government's representatives as complying with the contract. If the Government's representatives had not at that time understood that the contract was for 1,675,000 feet only, the copy of the order, limited to that amount, would not have been accepted; inspection authorized and deliveries accepted. *American Ry. Express Co. vs. Lindenburg*, U. S. S. C., Jan. 8, 1923, and cases cited.

The majority of the court below, after noticing that by the letter of May 21st, Mr. Scott first undertook to limit the liability of the appellant to 1,675,000 feet, then assert that deliveries made and *accepted orders* then on hand exceeded that amount.

In Finding V (Rec., p. 18), the majority of the court below found that by May 21st the Crown Lumber Company had delivered approximately 950,000 feet, and

received and accepted orders in addition thereto for the delivery of 1,186,000 feet, or 461,000 in excess of 1,675,000 feet.

We feel that we are justified in protesting against the manifestly unfair and unfounded finding of fact that the Crown Lumber Company, before May 21st, had *accepted* orders for lumber in excess of 1,675 M feet, and to disclose to this court upon what that finding was based. We quote from our motion for new trial and modification of findings of fact:

"The witness Scott testified (Rec., p. 19, Q. 39 and 40) that they never at any time consented to agree to furnish any lumber over and above the 1,675,000 feet at the price named in the contract and (Rec., p. 27, Cross-Question 127) he merely answered the inquiry as to orders in excess of 1,675,000 feet having been given and added, 'but not delivered.' The only reference in the record to the subject of acceptance of orders is in the statement of Hoopes, commencing at page 73 (in the record by stipulation), wherein at page 76 appears the following:

'Q. You may state whether or not formal acceptance of orders were usual under contracts of this kind?

A. Formal acceptances were not usually received from the contractors.

Q. Now, you may state, if you can, from an records, or correspondence which you may have, whether or not any amounts of lumber in excess of 1,675,000 feet had been ordered before the letter of the Crown Lumber Company, of May 21, 1917?

A. An examination of the records show that prior to May 21, orders in excess of the quantity covered by the contract had been placed and accepted by the contractor. *In support of this statement attention is invited to first indorsement signed by myself, dated May 14, 1919, file C-28942, on Bureau Supplies and Accounts letter of 2d of May, 1919, No. 28942 PD.'*

"It will be observed that the support for the statement of Hoopes that orders in excess of the quantity covered by the contract had been placed and *accepted* by the contractor, is the indorsement of May 14, 1919, accompanying his statement and appearing in the Record at page 78, as follows:

'It was not customary for the contractor or the sub-contractor to furnish any formal acceptance of the different orders placed, and the acceptance of these orders was considered automatic by this office upon their issuance in accordance with the terms of the contract. In view of this fact and the further fact that the last order previous to May 21st was dated May 16th, also the statement in enclosure (e) that the contractor had on hand at that date orders for a quantity in excess of that specified in the contract, it is considered that the protest filed in letter of May 21st, was filed after the acceptance of the orders; subsequent orders, however, were accepted under protest, as will be noted from enclosures (h), (m), (r), and (s).'

Aside from this, the Crown Lumber Company and Mr. Scott, as agents of the plaintiff, were without authority to accept, on behalf of the plaintiff, orders in excess of 1,675,000 feet. And, as suggested before, when Mr. Scott discovered that in his absence orders in excess of 1,675,000 feet had been received by the Crown Lumber Company, he wrote the letter of protest of May 21, *supra*.

And it may be suggested that the finding that orders in excess of 1,675,000 feet had been accepted, is a conclusion of law from undisclosed fact.

The majority of the court below, after speculating as to Mr. Scott's mental state, then assert that while he was attempting to limit the appellant's liability, the appellant itself, although informed of his attitude, made

no such contention, but on June 18 wrote the letter set out in Finding V (Rec., pp. 20-21) which, they seemed to think, clearly repudiated Mr. Scott's position.

As noted before, the majority of the court below refused to incorporate in its findings the letter of June 14 to which the letter of June 18 was a reply. In the letter of June 14 there was nothing to indicate that delivery in excess of the contract amount of 1,675,000 feet was referred to. And the reply of June 18, written from the appellant's office in San Francisco, contains nothing to indicate that the writer (the finding does not disclose by whom or by what authority that letter was written) was referring to orders or deliveries in excess of 1,675,000 feet, but the contrary. It is therein said that:

"It has never been our intention or aim to fail to make delivery of your requirements as we may be committed to under the contract above quoted."

Under the contract, aside from its lack of mutuality, the plaintiff was committed to delivery of only 1,675 M feet.

In the next paragraph it is said:

"Nothing is left undone in order to produce the lumber that you have ordered under the contract."

And the final sentence reads:

"We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your cooperation to assist us in completing our engagements."

There is nothing to indicate that the writer was even aware that orders in excess of the 1,675,000 feet had been transmitted to the Crown Lumber Company, and certainly he did not evidence by the language used, any idea of extension of the liability of the contractor

beyond the terms of the contract, yet the majority of the court below read that letter as a concession by the appellant that it was obligated by the contract to furnish any quantity of lumber without limit that might be ordered.

The majority of the court below then concluded:

"If the plaintiff's obligation under its contract was in fact to furnish 1,675,000 feet of lumber and no more, it would have been entirely within its rights, having furnished that amount, to refuse to furnish more. And having furnished additional quantities in compliance with orders specifically predicated on the contract, it can not while complying with such orders create or preserve by so-called protest a right to additional compensation over and above the contract price. We have so held in the recent case of Willard, Sutherland & Co. *vs.* United States, decided November 7, 1921."

The ruling in the Willard, Sutherland & Company case (now pending in this court as No. 209, this term), has been overruled by the decision of this court in the case of Freund & Roemmich *vs.* United States (Nos., 29 and 37), November 13, 1922.

ARGUMENT.

The plaintiff is entitled to recover upon three grounds:

1. Because the so-called contract was void for want of mutuality.
2. Even if the contract was legal and binding the said excess lumber was used for the building of submarine chasers, an entirely new type of vessel that had never been constructed at the Puget Sound Navy Yard or elsewhere. Consequently the use of the lumber for such purpose could not have been in contemplation of the parties at the time of the execution of the contract.

3. The action of the Government in compelling by threats the appellant to deliver approximately three times as much lumber as the Government specified, when there had been a great increase in the market price of such lumber, was unconscionable and against public policy and the plaintiff is entitled to recover for said excess lumber so furnished on a *quantum meruit*.

I.

CONTRACT VOID

The contract entered into by the appellant and the Government was void for want of mutuality, and the appellant could terminate it upon notice at any time. The Government rested its entire case upon the proposition that the following provision in the contract was valid and binding:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

It was under this provision that the officers of the Government contended that the plaintiff was obligated to deliver any amount of Douglas fir lumber that might be demanded for use at the navy yard during the period covered by the contract (Rec., 19, p. 21, Finding VI).

The Court of Claims in the opinion stated:

"The plaintiff first contends that this clause is void for want of mutuality in that the United States was not obligated. Such a contention is not tenable. The purpose of the contract was to procure such lumber during a given period as *might be needed*, at a place where lumber had

always been needed and where, so far as human foresight could know, lumber would be needed during the period covered by the contract. The plaintiff, with former experience under such contracts, sought by its bid *the right* to supply such needs, its *contract secured to it such rights* and they were enforceable thereunder." (Italics ours).

The court below says that it was "the purpose of the contract to procure such lumber during a given period as might be needed" at the yard but the contract contains no such provision. By construction the Court of Claims clearly interpolates in the contract the provision, "*needs of the yard.*" The Government did not agree to take what "*might be needed*" but only "*what may be ordered.*" While some lumber might be needed, there was no obligation on the part of the Government to purchase that amount, as it agreed only to purchase what "*may be ordered,*" *expressly denying obligation to order any.* The opinion of the Court of Claims says that the contract secured to the plaintiff "the right to supply such needs" but such provision is not to be found in the contract itself. The only right the plaintiff secured was to furnish such lumber as "*may be ordered,*" which is no right at all, for the Government might not order any. We submit that if the provision of the contract quoted is not void, for want of mutuality, then so far as the books show, human ingenuity and human blundering have not yet produced one that was.

The representatives of the Government, in their zeal to protect it, made the measure of the Government's liability not "*the needs of the yard*" but such quantity as the Government "*might order,*" and then to preclude any possibility of misunderstanding as to the liability of the Government added these words: "*the Government not being obligated to order any specific quantity of Douglas fir contracted for.*"

It is perfectly manifest that the Government exhausted its ingenuity in trying to write a contract that would bind the contractor but not the Government.

The fact that the Government based its entire defense on the validity of the provision of the contract above quoted and that the Court of Claims based its adverse decision on such validity, is the justification for presuming to argue a strictly elementary proposition of law and cite authorities thereon.

"And unless both parties are bound so that an action can be maintained by either against the other for a breach, neither will be bound. This proposition is absolutely axiomatic, not admitting of being overthrown by authorities, so long as the law requires something of value as a consideration, for when it is admitted that there is nothing for A's promise to rest on but B's promise, if B has not promised, A's promise rests on nothing and is void." (Bishop on Contracts, Enlarged Edition, Paragraph 78.)

What could the Government have done or failed to do that would have given the contractor a right of action against it for breach of the contract under the provision quoted? What was the Government obligated to do under that provision?

The intention of this so-called contract is perfectly apparent. It was an attempt on behalf of the Government to *bind the contractor* and leave the *Government free* to do whatever it thought was to its advantage. The Government attempted by this contract to place itself in a position where it could buy in the open market if the *price fell* and could compel the contractors to *furnish all* the lumber it desired if the *price increased*. No court of last resort in this country has ever sustained a contract containing such provision. The following citations are directly in point:

"But an accepted promise to furnish goods, merchandise or other property, at certain prices,

during a limited time, in such quantities as the acceptor shall require, or want in his business, is without consideration and void, because the acceptor is not bound thereby to require or take any articles whatever under the supposed agreement." (Cold Blast Transportation Co., 114 Fed., 77-80.)

"The defendant was not bound to order, to receive, or to pay for any of the articles named in the offer; and there was therefore no consideration for the offer itself, and no mutuality in the supposed agreement." (Ibid. 82.)

"But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity is without consideration and void, because the acceptor is not bound to want, desire or take any of the articles mentioned." (Ibid. 81.)

"Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which one refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder." (Ibid. 81.)

"Should the contract under discussion be upheld, the plaintiff in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to out bid competitors, increase also the quantum of orders; if, on the other hand, prices fall below the range of profits, the orders could be wholly discontinued."

"On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but should prices rise, the orders

sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It in effect binds the defendant in error alone, for it leaves the plaintiff in error—whose whole interest is embodied in the prices obtainable—in a situation to either go on or to discontinue, as such interest develops.” (*Crane vs. Crane & Co.*, 105 Fed., 869, 872.)

“And we can discover no way, by the terms of the contract, whereby the defendant could put the plaintiffs in default for failure to order more oil each week, because *the amount and times of ordering* are left wholly to the *plaintiffs*. If the market price of oil should fall below the contract price, then, according to their contention as to the terms of the contract, the plaintiffs could purchase their supply of oil elsewhere, and at the lower price, resorting to the contract, when, and only when, the price stated was lower than the market price—and this without respect to time. Such a contract is one-sided and without mutuality.” (*American Cotton Oil Co. vs. Kirk*, 68 Fed., 791, 793.)

“But, on plaintiffs’ own theory, it is manifest that the agreement is a *nudum pactum*. We scan its provisions in vain to find the imposition, on Campbell, of any obligation to *take or pay* for *any* amount of the coal whatever. He undertakes nothing except to pay, at the end of each month, for such coal as he *may have chosen to order*. (*Campbell vs. Lambert*, 36 La., 37.)

“In the case at bar the defendant confessedly was not obliged to take from the plaintiff, under the contract, all the stone required to complete his contract with the city, but only ‘such quantities as he might desire.’” (*Hoffman vs. Maffali*, 104 Wis., 637.)

“Upon the foregoing statements of facts the engagement of plaintiffs was to purchase all of said pig-iron which they *might want* in their

said business during the time specified; but they do not engage to want any quantity whatever. They do not even engage to continue their business. If they see fit to discontinue it on the very day on which the supposed agreement is entered into, they are at liberty to do so at their own option, and, whatever might have been defendant's expectation, he is without remedy. In other words, there is no absolute engagement on plaintiff's part to 'want' and of course no absolute engagement to purchase any iron of defendant." (Held void.) (*Bailey vs. Austrian*, 19 Minn., 535; Gil., 465, 468.)

"A contract 'to furnish, sell and deliver, to defendant all of the boot and shoe parts which defendant should *require* of *them* in his business aforesaid for the 'season' ensuing next after said agreement, which said 'season,' as all parties hereto then and there well knew, began in 1871 prior to December and ended about January 15, 1872; that they agreed to furnish, sell and deliver such articles, from time to time throughout such 'season' in such quantities and at such times as the said defendant should 'require and request' at certain named prices, which defendant on his part promised to pay." (Held contract was void.) (*Tarbox vs. Gotzian*, 20 Minn., 140. Gil., 122.)

The Court of Claims, in their opinion, referred to the case of *Willard, Sutherland & Company vs. the United States*, recently decided by it. (56 C. C., 413.) That case is now in this court on appeal. That case is also based upon a contract with the Navy Department and the form of contract used by the department is apparently the same as used in the case at bar.

The provision in dispute is *identical* except that in the *Willard, Sutherland* case the contract says "*coal specified which may be needed*" while in the case at bar those words are stricken out and the words "*Douglas fir which may be ordered,*" inserted.

The contract in the Willard case was signed some months prior to the contract in this case. It therefore conclusively appears that the Government in this case changed the form of contract that had been formerly used as in the Willard case. They changed the obligation of the contract from the "*needs of the yard*" to "*quantities ordered.*" The Court of Claims in this case, by interpretation, seeks to strike out the words inserted by the parties in the contract and to restore the words stricken out by them.

The court below, having by this new method reformed the contract so as to give it a meaning those who made it did not intend, then held that it was not void for want of mutuality.

II.

Excess Lumber Not Covered by Contract. The Purpose For Which the Lumber Above the Estimated Amount of 1,675,000 Feet Was Used Was Not Within the Terms of the Contract And Was Not Within the Contemplation of the Parties At the Time of the Execution of the Contract.

Even if the contract had been binding and valid the plaintiff would have been entitled to recover the market price for the lumber furnished over and above the specified amount, because much of the entire amount of lumber furnished, probably an amount much greater than the excess above the specified amount, was used in the construction of submarine chasers, a new type of boat never before constructed at this yard or elsewhere (Rec., p. 21, Finding VIII).

It is true that the Court of Claims finds only that this type of vessel had not been constructed at this yard, but this court knows judicially that none at the time of the execution of the contract had ever been constructed

anywhere. This type of vessel was invented after that time. In the language of a naval officer, "it was an unforeseen development of the war." At the time of the signing of the contract it was in "the womb of the future." When the contract was signed, it was made and accepted by both parties with reference to the ordinary requirements of the yard as ordinarily conducted. By the construction of submarine chasers, an entirely new business, the amount of lumber used at the yard was approximately three times as great as it had ever been before, and approximately three times as great as either party estimated it would be at the time the contract was signed.

"The proposition made and accepted was made with reference to 'the requirements of that well-established business.' Plaintiffs were not proposing to make castings beyond the current requirements of that business and would not have been obligated to supply castings not required in the usual course of that business." (*Lima Locomotive & Machine Co. vs. National Steel Castings Co.*, 155 Fed., 77.)

The Government contends that the parties intended to contract in reference to something that at the time the contract was made *never had been*, and insofar as human intelligence could know, *never would be*.

"No matter how broad or how general the terms of the contract may be, it will extend only to those matters with reference to which the parties intended to contract." (*Corpus Juris*, Vol. 13, 523.)

This court, in *Utah, N. & C. Stage Co. vs. U. S.*, 199, U. S., 414, in passing upon this question, used the following language:

"There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for

new or additional service of the same character. Otherwise it is within the power of the Government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals, a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation would hardly be seriously entertained. The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals."

In the case at bar the contention of the Government is more inequitable and more unjust, and incomparably more unconscionable than the one in which this court used the language above quoted. In this case, owing to the war, prices greatly increased, yet the Government not only demanded and received, below the market price, the full amount of 1,675,000 feet, which both parties agreed was all that would be required for all purposes at the yard, but by threats to buy in the open market and charge to the account of the contractor and to proceed against the contractor's bond, the Government coerced the contractor to furnish 2,013,259 feet additional for the construction of a new type of vessel—for work of a character that had never before been done at that or any other naval yard—and allowed therefor the contract prices, approximately \$10 per M below the market prices.

At the time of the decision of the Court of Claims in the case at bar, the case of *Freund et al. vs. United States*, *supra*, had not been decided by this court. That case would seem to be conclusive of the case at bar. The learned Chief Justice there disposes of the contention of the Government and the ruling of the Court of Claims

that the work demanded from the contractor by the Government came within the provisions of the contract, in the following plain and forcible statement of the law:

"It is, of course, wise and necessary that Government agents in binding their principal in contracts for construction or service should make provision for alterations in the plans, or changes in the service, within the four corners of the contract, and thus avoid the presentation of unreasonable claims for extras. This court has recognized that necessity and enforced various provisions to which it has given rise. But sometimes such contract provisions have been interpreted and enforced by executive officials as if they enabled those officers to remould the contract at will. The temptation of the bureau to adopt such clauses arises out of the fact that they avoid the necessity of labor, foresight and care in definitely drafting the contract, and reserve power in the bureau. This does not make for justice, it promotes the possibility of official favoritism as between contractors and results in enlarged expenditures, because it increases the prices which contractors, in view of the added risk, incorporate in their bids for Government contracts. These considerations, especially the first, have made this court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application to what should be regarded as having *been fairly and reasonably within the contemplation of the parties when the contract was entered into.*" (Italics ours.)

How can it be contended with *any pretense of sincerity* that in the case at bar the *furnishing of lumber for the construction of submarine chasers* "should be regarded as having been *fairly and reasonably within the contemplation of the parties when the contract was entered into*"? In the language quoted from the above-cited case, the ruling of the Court of Claims here that the furnishing of

the excess of lumber demanded was within the terms of the contract, "does not make for justice—it promotes the possibility of official favoritism as between contractors and results in enlarged expenditures, because it increases the price which contractors, in view of the added risk, incorporate in their bids for Government contracts."

Under the interpretation of the contract given by the Court of Claims, the representatives of the Government could favor or penalize the contractor at will. Such construction upon Government contracts of this character increases the cost of public work and opens wide the door to favoritism and fraud. In the case at bar, if the contractor had been financially weak, the Government would have destroyed it by this iniquitous interpretation.

III.

The Contract Was For 1,675,000 Feet Only.

By threats and coercion the Government compelled the plaintiff to deliver approximately three times the amount of lumber named by the parties in the making of the contract, and this excess was of a much higher grade and more valuable than the lumber that had generally been used at the yard before. The plaintiff had furnished lumber for the use of the yard under previous contracts, so both parties knew well what were the ordinary requirements of the ordinary business of the yard. If the contract is valid—which we deny—then a fair and reasonable reading of it demonstrates clearly that the plaintiff was to deliver only 1,675,000 feet (about) and no more. It is nowhere stated in the contract that the plaintiff shall deliver such quantities as are needed at the yard. What the contract states is "that the contractor shall furnish and deliver any quantities of

Douglas fir which may be ordered," and then in the next sentence says:

"Fir, Douglas, as follows:

1. 1,675,000 feet b. m. (about) of such sizes or grades as may be ordered—per M feet.)" (Rec., p. 8.)

Nowhere else is there a statement, estimate, or guess as to the amount of lumber that the plaintiff would be required to furnish. We submit that the statement in the contract was definite and specific; that the plaintiff under any circumstances, was not to furnish in excess of about 1,675,000 feet. It is not necessary to cite authorities to show that the term "about" thus used in a contract means approximately the sum specified. We submit that if the question of want of mutuality in the contract is waived, and the fact that the excess lumber was used for a new and unforeseen purpose that was not in contemplation of the parties at the time the contract was signed, even then it would be a harsh and unwarranted interpretation of the contract to say that the contractor was obligated to deliver approximately three times the amount specified in the contract, and that the parties so intended when the contract was signed, *If the Government agreed to do anything whatever under the terms of the contract it was not to order more than 1,675,000 feet.* The court will not put such harsh interpretation upon the contract as did the Court of Claims.

"The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other." (13 Corpus Juris., p. 540.)

This court, in the case of Freund et al. vs. U. S., *supra*, in discussing a provision in a Government contract

somewhat similar to the one under consideration, and speaking of the construction placed thereon by the Government, declared that such construction did not make for justice and that it promoted the possibility of official favoritism as between contractors, and then said:

"These considerations, especially the first, have made this court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application to what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into."

IV.

The Contractor Acted Under Duress.

In the case of *Freund et al. vs. U. S.*, *supra*, the court said:

"We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the Government, aside from the illegality of the construction of the contract insisted on."

The court will not overlook the duress under which the contractor acted in this case, nor forget that the action of the contractor in complying with the Government's demands did not in any way injure the Government, but favored it. The Government threatened to buy the lumber it was demanding in the market and charge the difference between the market price and the price named in the contract against the plaintiff. This, as the record shows, would have amounted to over \$18,000. The Government, further, threatened suit upon the bond and under the terms of the bond, the contractor, if liable, could have been penalized in any sum not to exceed 10

per cent of the purchase price of the lumber for failure to make prompt deliveries.

Again this court will take judicial knowledge of the practice of the Navy Department in regard to contractors listed by the department as having defaulted. The credit, reputation, and financial standing of the contractor would have been greatly damaged if it had refused to comply with the demands of the Government, no difference if it had afterwards established that it was acting entirely within its legal rights.

But greater than any of these things enumerated, and greater than all of them taken together, this court judicially knows that at the time the Government was making these demands upon the contractor the country was at war, that the lumber demanded was to be used for urgent needs of war—used in the construction of a newly invented vessel to destroy the infamous submarines that were not only murdering our soldiers and destroying our commerce, but were threatening the destruction of civilization. It was a time of excitement and great public feeling, and if the contractor had refused at this time to comply as promptly as possible with the demands of the Government, it faced the unspeakable odium of being charged with lack of patriotism, and of being accused of being a profiteer and a slacker. Under such circumstances to say that by complying with the demands of the Government the plaintiff waived any legal right it might have, is a proposition so unjust that no language is too harsh to characterize it.

V.

Erroneous Rule of Law Declared in the Opinion of the Court of Claims.

The Court of Claims in its opinion, uses this language:

“But whether the contract obligated the plaintiff to the extent of the needs of the navy yard or only to the extent of 1,675,000 feet of lumber,

the undisputed facts are that the defendant's representatives construed plaintiff's obligation as measured by the needs, irrespective of the estimated quantity stated, of which the plaintiff was fully informed, all orders were placed with direct reference to and under this contract, and the orders, except as withdrawn, were filled. If the plaintiff's obligation under its contract was in fact to furnish 1,675,000 feet of lumber and no more, it would have been entirely within its rights, having furnished that amount, to refuse to furnish more. And having furnished additional quantities in compliance with orders specifically predicated on the contract, it can not while complying with such orders create or preserve by so-called protest a right to additional compensation over and above the contract price. We have so held in the recent case of *Willard, Sutherland & Co. vs. United States*, decided November 7, 1921."

We submit that the language above quoted holds that even if the contract was void for want of mutuality, and if the excess of lumber was used for a new and different purpose not in the contemplation of the parties at the time the contract was signed, and if, under the specific terms of the contract the plaintiff was obligated to deliver only 1,675,000 feet, still, notwithstanding all these conditions, if the appellant did deliver the lumber it would have no right to recover the market price for the excess so delivered, no matter what threats the Government may have used or what protests may have been made by the contractor. In other words, we think that the Court of Claims squarely holds that if there is a dispute between the Government and a contractor as to the amount of material due under a contract, the contractor placing one construction upon it and the Government another, and the contractor, under threats and coercion, delivers more than the

amount that he was obligated to deliver under the contract, still under such circumstances the contractor cannot recover the market price for the excess so delivered if he has accepted as partial payment the price mentioned in the contract.

In other words, the Court of Claims holds that where there is a dispute between the Government and the contractor as to the construction of the contract, the contractor must, at his peril, refuse to accept the Government's construction and refuse under any circumstances to comply with the demands of the Government, or he waives all legal right to redress: Under this view of the law the court below consistently held that appellant's protests availed nothing. Such cannot be the law, nor would it be to the advantage of the Government to have it so. How is the Government injured by having the contractor deliver the material demanded upon the terms insisted upon by the Government, the contractor reserving the right after it is so delivered, to appeal to the courts to decide which party was correct in its interpretation of the contract?

The attitude of the Court of Claims on this point is directly and squarely in conflict with the decision in the case of Eugene Freund et al. *vs.* U. S., *supra*. That case is conclusive of the case at bar on every point except the want of mutuality in the contract, a point that did not arise in the Freund case. It is not conceivable that the Court of Claims would have made the decision it did in the case at bar if at the time it was rendered it had had before it the decision in the Freund case.

Respectfully submitted,

WILLIAM E. HUMPHREY,
Attorney for Appellant.

WILLIAM C. PRENTISS,
of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE CHARLES NELSON COMPANY, APPEL-	} No. 287.
lant,	
v.	
THE UNITED STATES.	

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims dismissing the petition upon findings of fact made after trial of the issues. The plaintiff sued to recover the sum of \$20,321.33, the difference between the market value and the contract price of certain lumber furnished to the United States and claimed to be in excess of the amount required under its contract to be furnished to the United States (p. 6).

From the findings of the Court of Claims it appears that the plaintiff is a California corporation which maintained intimate business relations with the Crown Lumber Company, operating a mill in the State of Washington, and the Puget Sound Mills and Timber Company, operating a mill at Port Angeles,

Washington, and the relations between the companies were such that the plaintiff at times filled its orders by directing one of the companies named to furnish the required materials. A. A. Scott was a stockholder and the authorized agent of the plaintiff company and the manager of the Crown Lumber Company. (First finding, p. 17.)

On January 3, 1917, after due advertisement, formal competitive bids were opened by the Navy Department for furnishing and delivering fir lumber to the United States at the Puget Sound Navy Yard in such quantities and at such times during the period ending December 31, 1917, as the supply officer might direct. Plaintiff's bid being the lowest, it was accepted, and the plaintiff was awarded the contract. (Second finding, p. 17.)

On February 23, 1917, a formal contract in writing, known as Contract No. 28942, was entered into between the plaintiff and the Navy Department, a copy of which contract is attached to the petition as "Exhibit A" and is set forth in the record on pages 7 to 14. The contract was the usual form of contract used by the Navy Department for procuring supplies during a given period, and the plaintiff in previous years had procured, entered into, and performed similar contracts. (Third finding, p. 17.)

This contract contained the following clause (p. 8):

It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quan-

ties of Douglas fir which may be ordered for the naval service at the place named during the period ending Dec. 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for.

The amount mentioned in the classification made part of the contract was 1,675,000 feet board measure "(about)" (p. 8).

About the time of the execution of the contract the plaintiff, on one of its usual order forms, directed the Crown Lumber Company to furnish 1,675,000 feet board measure of Douglas fir as the same might be ordered from time to time by the supply officer at the Puget Sound Navy Yard, and the supply officer was notified that A. A. Scott, General Manager of the Crown Lumber Company, was the authorized representative of the plaintiff company in the matter of furnishing the lumber under its contract. Thereafter, the supply officer at the Navy Yard from time to time transmitted orders for lumber to the Crown Lumber Company which were filled and the invoices therefor were signed by the Charles Nelson Company by A. A. Scott, its agent. (Fourth finding, pp. 17 and 18.)

By May 21, 1917, the Crown Lumber Company had delivered approximately 950,000 feet and received and accepted orders in addition thereto for the delivery of 1,186,000 feet. On May 17 the Commandant of the Navy Yard wired the plaintiff that he was withholding orders for approximately 130,000

feet of lumber on account of congestion at the Crown Lumber Mill, stating that delivery was desired by June 1 and asking if the plaintiff could arrange to furnish this and future urgent orders under the contract from other mills until the situation at the Crown Lumber Company was relieved, to which the plaintiff replied asking the Commandant to confer with Mr. Scott, and the next day it wrote:

Immediately on receipt of your telegram we wired Mr. A. A. Scott, general manager of the Puget Sound Mills & Timber Co., Port Angeles, to do everything he possibly could to furnish the orders you are withholding, as also other business that he may have on his books for the department. Would be pleased to have you confer with Mr. Scott relative this business.

The orders referred to and the orders theretofore received and the quantity of lumber delivered exceeded 1,675,000 feet, and the plaintiff, up to this time, had made no protest against filling orders in excess of that quantity. Delays in deliveries, pleas for indulgence, and means of expediting the filling of orders were the subjects of correspondence. On May 21, 1917, the Crown Lumber Company, by A. A. Scott, Manager, wrote the supply officer at the Navy Yard, calling attention to the provision of the contract for 1,675,000 feet and stating that there was due on the contract in addition to the amounts delivered only 725,000 feet, "so that you will have to recall approximately 461 M of these orders which you have sent us, as we can not apply them against

this contract, for we can not exceed the amount of the original contract, viz, 1,675 M feet. Would kindly ask you to advise us what proportion of these orders which we now have unfilled on our books that you wish to withdraw." On May 22 the supply officer replied to this letter, quoting from the plaintiff's contract the provision which we have already set forth, and saying: "Your request, therefore, will not be complied with, inasmuch as the contractor, the Charles Nelson Company, is bound to deliver any quantity of lumber which may be ordered under this contract as per terms mentioned above," and further stating that a copy of the letter was being furnished to the Charles Nelson Company with the request that the situation be relieved by removing from the Crown Company's hands orders covering sufficient lumber to insure prompt delivery under all orders outstanding.

When the letter of May 21 was written by Mr. Scott he did not know of the provision in plaintiff's contract, and claims no knowledge of that provision prior to September 25, 1917 (p. 19). On May 23 the supply officer at the Navy Yard wired the plaintiff that the Crown Lumber Company and the Puget Sound Company had declined to fill orders for approximately 300,000 feet and that unless immediate arrangements were made to effect delivery by June 10 it would be "necessary to purchase in open market against your account." On June 2 the supply officer, addressing the Crown Lumber Company and forwarding an order under the contract for 287,940 feet, said:

This order is submitted in accordance with telephone conversation of Mr. A. A. Scott, of the Puget Sound Mill and Timber Company, of Port Angeles. It is understood from Mr. Scott that the delivery conditions specified above could be complied with, but if for any reason it is not possible to make deliveries as specified you will please notify this office by return mail in order that steps may be taken to procure the lumber in the open market.

On June 7, 1917, acknowledging this order, the Crown Lumber Company, "by A. A. Scott, vice pres. & genl. manager," said: "We are accepting this order under protest, especially as to delivery date." Order No. 7, dated June 5, was on June 11 accepted by the Crown Lumber Company by A. A. Scott, manager, "under protest;" order No. 8, of June 21, was, on June 26, over the same signature, accepted "under protest, especially as to delivery;" and order No. 9, of June 28, was on July 2, over the same signature, accepted "under protest, especially as to delivery." On June 28, 1917, the *plaintiff company* wrote the supply officer at some length, and the letter is set forth in the fifth finding of fact on page 20.

This letter refers to a letter from the supply officer transmitting instructions received from the Navy Department at Washington, authorizing purchase "as requested" if the contractor failed to make delivery. In this letter the plaintiff states that it has never been its intention or aim to fail to make de-

livery, and that Mr. Scott had been instructed to give the defendant's business the right of way; that its vice president had been "on the Sound" recently and stated that at both mills nothing was left undone to produce the lumber ordered under the contract. It further goes on to state that when the plaintiff entered into the contract it never dreamt that it would be expected to deliver extraordinary quantities of clear lumber of long lengths within the time limits specified, and that it felt that it was entitled to some consideration and a little leniency. It also sets forth that if the defendant should buy this lumber in the open market "you probably would penalize us \$10 per M." The writer expresses himself as feeling that plaintiff was not responsible for the extraordinary conditions and concludes: "We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your cooperation to assist us in completing our engagements." (Fifth finding, pp. 20 and 21.)

In June, 1917, Mr. Scott had a conference with officers at the Navy Yard, brought about by the apparent inability of the contractor to deliver lumber as rapidly as needed and for the purpose of urging action. During this conference *Mr. Scott* protested against being required to deliver more than 1,675,000 feet at the contract price, but the representatives of the Government maintained that the matter was governed by the contract and no promise of any kind was made to pay more than the contract price.

The Court of Claims finds:

Large quantities of lumber were thereafter delivered on orders theretofore and thereafter placed under the contract. No protest against furnishing more than 1,675,000 feet of lumber under the contract was ever made by the plaintiff company itself or any of its officers, and it does not appear that Mr. Scott was directed to make such a protest at the conference above referred to or that he was acting within his authority in so doing.

The plaintiff company furnished to the defendant, on orders placed by the defendant under Contract 28942, 3,688,259 feet of lumber, for which it was paid at the contract price, and it did not at the time of any payment make to the United States any protest against payment at that price, and so far as the United States was informed such payments were accepted as in full. (Seventh finding, p. 21.)

ARGUMENT.

I.

The findings by the Court of Claims seem to render any extended discussion of the case unnecessary. These findings show that at one time a difference of opinion arose between the Government officers and Mr. Scott with respect to the meaning of the contract between the appellant and the United States, Mr. Scott claiming that the obligation assumed by the appellant was fulfilled by furnishing 1,675,000 feet of lumber, while the Government

claimed that under the clause of the contract hereinbefore quoted the contractor was obligated to furnish any quantity "which may be ordered for the naval service at the place named during the period ending December 31, 1917, irrespective of the estimated quantity named." The naval officers insisted that their interpretation was right and threatened to purchase lumber in the market against the contract if the contractor refused to perform. It appears that Mr. Scott at this time did not know of that provision of the contract, and he seems to have had in mind the order placed with the Crown Lumber Company by the contractor about the time the formal contract was executed, which order to his company was for 1,675,000 feet, and his protest seems to have been based upon that and not upon knowledge of the terms of the contract with the appellant. The Court of Claims says in its opinion, "It must be assumed that he was interpreting the contract liability of the plaintiff by the terms of the order issued to the Crown Lumber Company of which he was manager." Thereafter he accepted orders indicating that the acceptance was under protest, in most cases "especially as to delivery date," and, as the Court of Claims says, delivery dates seem to have been more a subject of controversy than anything else (p. 23). But while Mr. Scott was doing this, the plaintiff itself, although informed of Scott's attitude, made no such contention, but on June 18, 1917, wrote to the supply

officer the letter set forth in finding 5, to which we have referred, which seems clearly to be a repudiation of Scott's position and an assertion by the appellant itself of its willingness to furnish all the lumber ordered. This letter is not a protest against furnishing lumber but an explanation why there had been some delay, with the request that the Department exercise forbearance, inasmuch as the appellant was doing its best under "extraordinary conditions" for which it was not responsible. There is no claim whatsoever in this letter that the appellant is not required to fill any of the orders given by the supply officer, and, as the Court of Claims has found, no protest against furnishing it was ever made by the plaintiff company itself or any of its officers. At any rate all the orders were accepted and filled without further protest, and the lumber was paid for at the contract price. No protest was made at the time of payment and, so far as the United States was informed, such payments were accepted in full. If the plaintiff's obligation under its contract was in effect to furnish 1,675,000 feet of lumber, and no more, it would have been entirely within its rights, having furnished that amount, to refuse to furnish more, and having furnished additional quantities in compliance with orders specifically predicated on the contract, and after accepting payment therefor at the contract price without protest, it can not now recover additional compensation therefor.

II.

In appellant's brief it is claimed under the first point that the contract was void for mutuality and that the appellant could terminate it upon notice at any time. A sufficient answer to this is that the appellant did not elect so to do. It is therefore unnecessary to consider what its rights might have been.

The appellant argues under the second point of its brief that the purpose for which the lumber above the estimated amount was used was not covered by the contract and therefore was not within the contemplation of the parties within the time of the execution thereof, but what has already been said is an answer to this contention. If the appellant was not bound to furnish this lumber under the contract it should have refused to do so, or at least saved the point in some legal manner. Its position was clearly one of acquiescence. Its letter of June 18, 1907, already referred to and set forth in the fifth finding of fact on page 20, makes this perfectly plain. There is in this letter no claim whatever that it was not obligated to furnish the lumber required, and so far from being an assertion of any such claim it is rather an admission thereof, coupled with a courteous and conciliatory explanation of delays, and request, not that it be relieved from filling the orders, but that it be given reasonable time under the circumstances so to do.

There was none of the elements of duress or unfairness in the attitude of the naval officers of the kind involved in the case of *Freund v. United States*, decided by this court November 13, 1922, and referred to in plaintiff's brief, and if the construction placed upon the contract by the naval officers was incorrect, it was adopted without further protest by the appellant. The most that was done by the supply officer was to send a telegram to the appellant that the subsidiary companies had declined to fill orders and that "unless immediate arrangements are made to effect delivery by June 10 it will be necessary to purchase in open market against your account" (p. 19). The whole controversy seems to have been between the supply officer and Mr. Scott, for as soon as the situation was brought to the attention of the appellant itself, it wrote the letter of June 18, 1917, already referred to, saying among other things that Mr. Scott had been instructed to give "your business the right of way," and that appellant's vice president had been "on the Sound recently, and he states that at both mills nothing is left undone in order to produce the lumber that you have ordered under the contract." Surely this can not be such compulsion, coercion, duress, or by whatever name it may be described as made involuntary the acts of the appellant thereafter in furnishing the lumber and accepting payment without protest, and entitled it to sue upon an implied promise to pay more. If the appellant had supported Mr. Scott and notified the supply officer that it claimed that it had already complied with its con-

tract and refused to furnish any more at the contract price, there would be some force to the contention; but as soon as Mr. Scott's principal, the contractor and appellant herein, learned of what had taken place, it in effect repudiated the position taken by Mr. Scott and thereafter proceeded to furnish the lumber and accept the contract price therefor in full, and the Court of Claims finds, as a fact, that so far as the United States is informed, the payments were accepted in full (p. 21). That court says, in its opinion, that if the plaintiff accepted these payments as partial payments only, "the proof goes no further than to indicate either an unexpressed mental reservation or an afterthought." It is respectfully submitted that unexpressed mental reservations and afterthoughts do not furnish causes of action against the United States.

CONCLUSION.

Whatever may have been the true construction of the contract, the appellant having accepted the construction placed upon it by the officers of the Government, having complied with this construction and received pay in full without protest or reservation, the judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

JANUARY, 1923.

CHARLES NELSON COMPANY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 287. Argued January 25, 26, 1923.—Decided February 19, 1923.

A contract for furnishing lumber to the Government at a specified price contained a clause obliging the contractor to deliver any quantities ordered in a certain period irrespective of the estimated quantity named in the contract. *Held* that the contractor, in furnishing lumber in excess of that quantity and in accepting the contract price therefor without protest, knowing that the Government was relying on the contract, waived his right to insist that the clause was void for lack of mutuality and could not recover the difference between the contract and higher, market prices for the excess so furnished. P. 19.

56 Ct. Clms. 448, affirmed.

APPEAL from a judgment of the Court of Claims.

Mr. William E. Humphrey and *Mr. William C. Prentiss* for appellant.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the plaintiff, the Charles Nelson Company, after a hearing of the evidence and upon findings made. The plaintiff was the lowest and accepted bidder upon advertised solicitation of the Navy

Department for the furnishing and delivery of lumber at the Puget Sound Navy Yard for a period ending December 31, 1917. This suit is to recover the sum of \$20,321.33, the amount with interest of the difference between the market value and the price bid upon what the plaintiff claims was an unjust excess over and above the amount of lumber it should have delivered and that which at the insistence of the Navy Department it did deliver.

The bids were opened January 3, 1917. The contract was signed February 23, 1917. Thereby the plaintiff agreed to furnish and deliver f. o. b. alongside wharf, navy yard, Puget Sound, lumber of certain kinds in such quantities and at such times during the period ending December 31, 1917, as the supply officer of the Navy might direct. "All deliveries to be made promptly and orders of 50,000 ft. b. m. or less of assorted sizes, not more than 10,000 ft. b. m. of any one size, except with the consent of the contractor, must be delivered within 10 days after receipt of order. All other orders must be delivered within 25 days after date of receipt of order from the supply officer." The contract contained this provision which was evidently taken from the form of bids solicited:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantities of Douglas fir which may be ordered for the naval service at the place named during the period ending Dec. 31, 1917, irrespective of the estimated quantity named, the Government not being obligated to order any specific quantity of Douglas fir contracted for."

Then follows:

"Class 5—Continued.

Stock Classification No. 39.

Fir, Douglas, as follows:

1. 1,675,000 feet b. m. (about), of such sizes or grades as may be ordered—per M feet."

The Navy Department on orders placed by it before December 31, 1917, received from the plaintiff 3,688,259 feet b. m. of Douglas fir. The amount furnished above 1,675,000 feet was worth at market price, delivered at the navy yard, \$18,310.21 more than the plaintiff was paid therefor at the prices bid and accepted.

After the execution of the contract and as a development of the World War the Government entered upon the building of submarine chasers at this navy yard, a type of vessel never before built there, and much of the lumber required of the plaintiff under its contract was used in the construction of these vessels.

The plaintiff denies that the writing signed by it was a binding contract, because there was no mutuality of obligation. The Government answers this by citing the case of *United States v. Purcell Envelope Co.*, 249 U. S. 313. In that case the Post Office Department invited bids "for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years, beginning on the first day of October, 1898." The bid of the Purcell Company was accepted. The formal contract was signed by the Company and bond given. Subsequently the Postmaster General refused to sign this contract, and bought the envelopes and wrappers elsewhere. This Court held that the acceptance of the bid made the contract, that the words above quoted must be construed to mean that the Company should furnish all the envelopes and wrappers of the specified sizes which the Department would need during the four years' period, and that the Government was as much bound to take the envelopes and wrappers as the bidder was bound to furnish them. Heavy damages for the breach of the contract were awarded against the United States. But it is to be observed that there was in the contract or invitation for bids no express denial of the obligation of the Post Office

Department to take the envelopes in that case, so that the question of a lack of mutuality did not arise in the *Purcell Case* as it does here.

But we are not obliged definitely to pass upon the question whether the instrument relied on by the Government constituted a contract binding on the plaintiff for the whole amount ordered at the price bid, because under the findings of the Court of Claims, the plaintiff must be held to have waived any right to claim more than the price it bid for any part of the lumber it furnished.

The findings show that the plaintiff did not furnish the lumber itself but relied on two so-called subsidiary companies to do so. The manager of one of the companies, the Crown Lumber Company, was Scott. He was also a stockholder and officer in the plaintiff. Scott received an order for 1,675,000 feet b. m. of lumber from the plaintiff to be delivered to the navy yard. In May, there was delay in deliveries by the Crown Lumber Company of which the navy yard commandant made complaint to the plaintiff by telegram, to which plaintiff replied referring the commandant to Scott. Having delivered 950,000 feet, and accepted orders in addition thereto of 1,186,000 feet, Scott on May 21st, wrote to the navy yard supply officer calling attention to the fact that the orders received unfilled were for 1,186,000 feet whereas there were only 725,000 feet due on the original contract for 1,675,000 feet, and asking him to say which of the orders he wished to withdraw. It appeared that Scott was not then advised of the terms of the contract. The supply officer replied quoting from the contract the clause quoted above, refusing to withdraw any orders and insisting on fulfillment of all orders issued and to be issued. A copy of the letter was sent to plaintiff at its office in San Francisco. After further correspondence in which the supply officer threatened the plaintiff to buy in the open market against its account, the Crown Lumber Company by

Scott, June 7th, accepted another order "under protest, especially as to delivery date." On June 11th, Scott accepted another order "under protest." On June 26th and July 2nd he accepted other orders "under protest, especially as to delivery." In June, Scott and Jackson, vice-president of the plaintiff, held a conference with the supply officer at the navy yard to discuss the failure to keep up with the deliveries as the Government needed them. During this conference Scott again protested at being compelled to deliver any more than 1,675,000 feet at the contract price. The supply officer stood upon the contract and made no promise to pay more than the contract price. Scott testified that in spite of the letter sent him by the supply officer, he did not know, until the next September, the terms of the contract except from the insufficient memorandum of order sent him by the plaintiff company soon after the contract was signed. The Court of Claims finds that it did not appear that Scott was directed by the Company to make such a protest as at the June meeting or that he was acting within his authority in so doing. On June 18th, the plaintiff company wrote the supply officer as follows:

"Dear Sir: Contract 28942. We have for acknowledgment your letter of the 14th, in which you transmit instructions received from the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., in which you are instructed as follows:

" 'Contract 28942, if contractor fails to make delivery, purchase authorized as requested.'

"May we be permitted to state that it has never been our intention or aim to fail to make delivery of your requirements as we may be committed to under the contract above quoted? Mr. A. A. Scott, our resident agent on Puget Sound, has been instructed to give your business the right of way, both at the Mukilteo and Port Angeles plants.

"Mr. H. W. Jackson, our vice president, was on the Sound recently, and he states that at both mills nothing is left undone in order to produce the lumber that you have ordered under the contract.

"By way of further explanation we might say that when we entered into this contract with your department we never dreamt that we would be expected to deliver extraordinary quantities of clear lumber of long lengths, such as planking, decking, etc., within the time limits specified in the contract. In connection with these orders we feel that we are entitled to some consideration and a little leniency. The contract itself states that we are committed to making deliveries on your orders 50 M feet per B. M. or less of assorted sizes, not more than 10 M feet B. M. of any one size except with the contractor's consent, which must be delivered within ten days after date of receipt of order, and that all other orders must be delivered within twenty-five days after date of receipt of order from the supply officer. Therefore we submit that when you order 100 M feet of decking or ship lumber of long lengths and ask us to furnish same within ten days you are requiring more of us than is specified in the written contract.

"For this special material, if you were to buy this in the open market to-day, you probably would penalize us \$10.00 per M. We feel sure that it is not the desire of your department to arbitrarily penalize us to that extent, in view of the fact that we are doing our utmost to execute your orders within the time limits.

"We feel that we are not responsible for the extraordinary conditions which have arisen since the contract was executed. We are reliably informed that the War Department has canceled their contracts and is now re-distributing their requirements, having in view existing conditions. We also feel that your department should interpret our engagement in the same way. We trust you

will accept this communication in the spirit in which it is sent. We are not asking to be relieved of any responsibility, but rather we submit the facts with a view of enlisting your cooperation to assist us in completing our engagements."

The Court of Claims further found that "no protest against furnishing more than 1,675,000 feet of lumber under the contract was ever made by the plaintiff company itself or any of its officers," and the VII finding was as follows:

"The plaintiff company furnished to the defendant on orders placed by the defendant under contract 28942, 3,688,259 feet of lumber, for which it was paid at the contract price, and it did not at the time of any payment make to the United States any protest against payment at that price, and so far as the United States was informed such payments were accepted as in full.

"The amount of lumber furnished over and above 1,675,000 feet was worth at market price, delivered at the navy yard, \$18,310.21 more than the plaintiff was paid therefor at contract price."

On these findings we can see no escape for the plaintiff from acquiescence by its conduct in the price bid for the whole amount of lumber delivered.

The plaintiff relies on the opinion of this Court in *Freund v. United States*, 260 U. S. 60. The facts of that case are very different from this. They involved conduct on the part of the representatives of the Government of questionable fairness toward the contractors and showed no such acquiescence and absence of protest as here appear.

It may be as counsel suggest that the plaintiff's course was influenced by a patriotic wish to help the Government when it was engaged in war. If so, it was to be commended. But this can not change the legal effect of its evident acquiescence seen in its letter of June 18th

and its failure to protest thereafter and to put the Government on notice that it intended to claim a recovery on a *quantum valebat* when it was delivering the extra two million feet of lumber and receiving the payments therefor from the Government at the prices named in the bid. The judgment of the Court of Claims is

Affirmed.